No. 17-419	
Title:	James Dawson, et ux., Petitioners v. Dale W. Steager, West Virginia State Tax Commissioner
Docketed:	September 19, 2017
Linked with 17A159	
Lower Ct:	Supreme Court of Appeals of West Virginia
Case Numbers:	(16-0441)
Decision Date:	May 17, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Aug 07 2017	Application (17A159) to extend the time to file a petition for a writ of certiorari from August 15, 2017 to October 13, 2017, submitted to The Chief Justice.
Aug 09 2017	Application (17A159) granted by The Chief Justice extending the time to file until September 9, 2017.
Aug 25 2017	Application (17A159) to extend further the time from September 9, 2017 to September 25, 2017, submitted to The Chief Justice.
Aug 29 2017	Application (17A159) granted by The Chief Justice extending the time to file until September 19, 2017. No further extensions will be granted.
Sep 19 2017	Petition for a writ of certiorari filed. (Response due October 19, 2017)
Oct 05 2017	Order extending time to file response to petition to and including November 20, 2017.
Nov 20 2017	Brief of respondent Dale Steager, WV State Tax Comm'r in opposition filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 05 2017	Reply of petitioner James Dawson filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 06 2017	DISTRIBUTED for Conference of 1/5/2018.

Jan 08 2018	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 15 2018	Brief amicus curiae of United States filed. **Certificate of Word Count** **Main Document**
May 29 2018	DISTRIBUTED for Conference of 6/14/2018.
May 29 2018	Supplemental brief of respondent Dale Steager, WV State Tax Commissioner filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 18 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 25 2018	Petition GRANTED limited to the question presented by the Solicitor General in his brief for the United States as amicus curiae.
Jul 17 2018	Letter re Briefing Schedule of James Dawson not accepted for filing. (Corrected letter to be submitted - July 23, 2018)
Jul 24 2018	Motion for an extension of time to file the opening briefs on the merits filed. **Main Document**
Jul 27 2018	Motion for an extension of time to file the opening briefs on the merits granted. The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 28, 2018. The time to file respondent's brief on the merits is extended to and including October 16, 2018.
Aug 28 2018	Brief of petitioner James Dawson filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 28 2018	Joint appendix filed. (Statement of costs filed) **Main Document**
Aug 29 2018	Blanket Consent filed by Petitioner, James Dawson **Blanket Consent**
Aug 31 2018	Blanket Consent filed by Respondent, Dale Steager, WV State Tax Commissioner **Blanket Consent**
Sep 04 2018	Brief amicus curiae of NARFE filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 04 2018	Brief amicus curiae of United States filed.

	Certificate of Word Count **Main Document**
Sep 27 2018	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Oct 09 2018	SET FOR ARGUMENT ON Monday, December 3, 2018
Oct 09 2018	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kavanaugh took no part in the consideration or decision of this motion.
Oct 15 2018	Record requested from the Supreme Court of West Virginia.
Oct 16 2018	Brief of respondent Dale Steager, WV State Tax Commissioner filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 19 2018	CIRCULATED
Nov 06 2018	Record received from the Supreme Court of West Virginia is complete. (1 Box)
Nov 15 2018	Reply of petitioner James Dawson filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 03 2018	Argued. For petitioners: Lawrence D. Rosenberg, Washington, D. C.; and Michael R. Huston, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Lindsay S. See, West Virginia Solicitor General, Charleston, W. Va.

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RECORD AND BRIEFS

17-419

Supreme Court, U.S.

No. ___

IN THE

Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER, AS STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 815-16 (1989), this Court held that a state may not impose a heavier tax burden on federal employees than state employees, unless the discriminatory treatment is "justified by significant differences between the two classes." Such tax discrimination—even against a "subcategory" of federal employees—violates the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111. *See Jefferson Cty., Ala. v. Acker*, 527 U.S. 423 (1999).

James Dawson worked as a deputy U.S. Marshal before being presidentially appointed as the U.S. Marshal for the Southern District of West Virginia. Mr. Dawson was enrolled exclusively in the Federal Employee Retirement System ("FERS"). He sought a West Virginia tax exemption for all of his FERS retirement income, but that exemption was ultimately denied.

Under West Virginia Law, Mr. Dawson is entitled to exempt *a portion* of his FERS income from his state taxable income. *See* W. VA. CODE §§ 11-21-12(c)(5) and 11-21-12(c)(8). In contrast, West Virginia law allows state law enforcement retirees to *entirely exempt* from their taxable income *all benefits* received from four West Virginia retirement plans. *See id.* § 11-21-12(c)(6). Federal law enforcement retirees like Mr. Dawson are not entitled to full exemptions, although it is undisputed that Mr. Dawson's job duties were not significantly different from those of the exempted state law enforcement officers.

After *Davis*, three state courts of last resort struck down tax laws that discriminate against federal em-

ployees, but three state courts of last resort have upheld such laws based on an extremely narrow and strained reading of *Davis*, while many other state courts of last resort have inconsistently ruled on related laws.

The question presented is:

Whether this Court's precedent and the doctrine of intergovernmental tax immunity bar states from exempting groups of state retirees from state income tax while discriminating against similarly situated federal retirees based on the source of their retirement income.

PARTIES TO THE PROCEEDING

James Dawson and Elaine Dawson were the petitioners before the Circuit Court of Mercer County, West Virginia, and the respondents below. Dale W. Steager. as State Tax Commissioner of West Virginia, was the respondent before the Circuit Court of Mercer County, West Virginia, and the petitioner below.

No corporations are involved in this proceeding.

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Petitioners James Dawson and Elaine Dawson respectfully submit this petition for a writ of certiorari to the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The Supreme Court of Appeals of West Virginia's opinion is unreported, but is available at 2017 WL 2172006, and is reproduced at Pet.App.1a. The Circuit Court of Mercer County, West Virginia's order reversing the decision of the West Virginia Office of Tax Appeals is unreported and is reproduced at Pet.App.17a.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered judgment on October 19, 2016. On August 9, 2017, Chief Justice Roberts extended the time for filing this petition to and including September 9, 2017. *See* No. 17A159. On August 29, 2017, Chief Justice Roberts further extended the time for filing this petition to and including September 19, 2017. *Id.* This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

4 U.S.C. § 111(a) states:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee

because of the source of the pay or compensation.

STATEMENT OF THE CASE

A. Factual Background

1. This case concerns West Virginia's differential taxation treatment of a federal law enforcement officer's retirement benefits from similarly situated state law enforcement officers, whose retirement benefits are fully exempted from taxation.

Respondent James Dawson is a former Nicholas County, West Virginia, Deputy Sheriff, Deputy U.S. Marshal, and U.S. Marshal who retired from the U.S. Marshals Service on March 31, 2008. Pet.App.4a. While employed by the U.S. Marshals Service, Mr. Dawson was enrolled in the Federal Employee Retirement System ("FERS"), and he now receives retirement benefits from FERS. *Id.*

Under West Virginia law, Mr. Dawson is entitled to exempt at least $2,000 of FERS income from his state taxable income. *See* W. VA. CODE § 11-21-12(c)(5). When he reaches age 65, he may exempt up to $8,000. *See id.* § 11-21-12(c)(8).

2. On the other hand, West Virginia law allows the state law enforcement recipients of four West Virginia law enforcement retirement plans to exempt from their taxable state income *all of the benefits received* from those plans, without limitation. *See id.* § 11-21-12(c)(6) ("Section 12(c)(6)"). The four retirement plans covered by Section 12(c)(6) are: (1) Municipal Police Officer and Firefighter Retirement System ("MPFRS"); (2) the Deputy Sheriff Retirement System ("DSRS"); (3) the State Police Death, Disability and Retirement Fund ("Trooper Plan A"); and (4) the

West Virginia State Police Retirement System ("Trooper Plan B").[1]

3. Consistent with the exemption offered to similarly situated state law enforcement officers, on or about October 24, 2013, Mr. Dawson and his wife Elaine filed amended tax returns claiming a full adjustment exempting Mr. Dawson's FERS retirement income from state income tax pursuant to Section 12(c)(6) for the years 2010 and 2011. Pet.App.4a.

B. The Proceedings Below

1. On November 19, 2013, the Dawsons received letters from the West Virginia State Tax Department (hereinafter "the Tax Department") denying the exemption. Pet.App.18a. On or about January 10, 2014, the Dawsons appealed the Tax Department's

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[1] West Virginia taxes the income of retired local and state employees received from the Public Employees Retirement System ("PERS") and the State Teachers Retirement System ("TRS"), as well as from federal or military retirement systems. W. VA. CODE § 11-21-12(c)(5). West Virginia law permits, however, the recipients of PERS, TRS, or a general federal retirement to exempt up to $2,000 of retirement benefits from their taxable income. *Id.* The recipients of military retirement benefits are permitted to exempt up to $20,000. W. VA. CODE § 11-21-12(c)(7)(B). In addition, any taxpayer age 65 or older may exempt up to $8,000 from their taxable income, regardless of their source of income. W. VA. CODE § 11-21-12(c)(8).

Certain deputy sheriffs in West Virginia are enrolled in PERS, rather than DSRS, and thus do not receive a tax exemption under Section 12(c)(6). When DSRS was created in 1998, deputy sheriffs at that time had the option to join DSRS or remain in PERS. All deputy sheriffs hired after the creation of DSRS are enrolled in that system, however, and thus receive the full tax exemption of Section 12(c)(6).

denial by submitting a timely Petition for Refund to the West Virginia Office of Tax Appeals (hereinafter "OTA"). Pet.App.4a. On August 7, 2015, OTA affirmed the Tax Commissioner's denial of the Dawson's Section 12(c)(6) exemption. *Id.* at 5a.

2. The Dawsons appealed to the Circuit Court of Mercer County, West Virginia. *Id.* In an order dated March 31, 2016, the circuit court reversed the decision of OTA, holding that the denial of an exemption to Dawson violated 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity, and was contrary to this Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). Pet.App.24a-25a. The court held that the Supreme Court of Appeals of West Virginia's previous decision in *Brown v. Mierke*, 443 S.E.2d 462 (W. Va. 1994), did not apply to this case. Pet.App.22a.

In *Davis*, this Court held that a Michigan statute that exempted from taxation all retirement benefits paid by the state or its political subdivisions, but levied an income tax on retirement benefits paid by all other employers, including the federal government, violated the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111. 489 U.S. at 805. Under the doctrine of intergovernmental tax immunity, the imposition of a "heavier tax burden on those who deal with one sovereign than is imposed on those who deal with the other must be justified by significant differences between the two classes." *Id.* at 815-16. Finding no significant difference between state and federal employees that justified their unequal tax treatment, this Court held that the Michigan taxing scheme violated "principles of intergovernmental tax immunity by favoring retired state and local gov-

ernment employees over retired federal employees." *Id.* at 817.

In *Brown*, the Supreme Court of Appeals of West Virginia held that Section 12(c)(6)—the same statute at issue here—did not violate the doctrine of intergovernmental tax immunity. 443 S.E.2d at 464. The court reasoned that this Court's holding in *Davis* did not apply to Section 12(c)(6) because the blanket tax exemption in *Davis* was intended to "discriminate against federal retirees" in violation of the doctrine of intergovernmental tax immunity. *Id.* at 466. On the other hand, according to the court, Section 12(c)(6) applied to a narrow class of former state employees and was intended only to "to give a benefit" to that "narrow class." *Id.* at 466. Therefore, the *Brown* court held that "no calculated scheme or plan exists" in Section 12(c)(6) "to discriminate against retired military personnel based on the source of their income." *Id.* at 467. The court upheld Section 12(c)(6).

After reviewing this West Virginia and United States Supreme Court precedent, the circuit court below held that this Court's decision in *Davis*, and not the West Virginia Supreme Court's decision in *Brown*, controlled. Pet.App.21a-22a. Unlike in *Brown*, where the military retiree plaintiffs failed to demonstrate that their job descriptions correspond to the job descriptions of the exempted state employees, here it is "undisputed" that "there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers listed in [Section 12(c)(6)]." Pet.App.22a. Because *Davis* establishes that "a state tax law violates intergovernmental tax immunity if it treats state and local gov-

ernment employees more favorably than similarly situated federal government retirees," the circuit court determined that *Davis* and not *Brown* controlled. Pet.App.21a (citing *Davis*, 489 U.S. at 815, 816).

Applying *Davis* and its progeny, the circuit court noted that the state's discriminatory purpose in enacting Section 12(c)(6) was clear and improper. In fact, during oral argument, the state justified its discriminatory treatment of federal law enforcement officers by admitting that the purpose of Section 12(c)(6) was to "benefit the narrow class of *state* law enforcement officers" listed in the statute. Pet.App.23a. Thus, the inconsistent tax treatment was "unquestionably based on the source of one's retirement income and precisely the type of favoritism the doctrine of intergovernmental tax immunity prohibits." *Id.* The circuit court held that the state's intentional discrimination against federal employees in favor of state employees ran afoul of *Davis* and violated the doctrine of intergovernmental tax immunity. *Id.* at 23a-25a.

3. The Tax Commissioner appealed the circuit court's decision to the Supreme Court of Appeals of West Virginia. *Id.* at 1a. The court below reversed the circuit court's decision, holding that the statute did not violate the doctrine of intergovernmental tax immunity.

In so holding, the court departed from the reasoning of the circuit court and did not apply *Davis* and its progeny. The court determined that *Davis* did not apply to this case because in the Michigan statute at issue there was a blanket tax exemption for all state employees. *Id.* at 13a. But here, Section 12(c)(6)

does not afford a "blanket exception" to all state retirees; rather, it confers the tax exemption on a limited class of state law enforcement retirees. Pet.App.13a. Thus, the narrow scope of the discriminatory Section 12(c)(6) caused the court below to disregard this Court's intergovernmental tax immunity precedent entirely.

Instead, the court below determined that its prior decision in *Brown* controlled because Section 12(c)(6) exempts only a narrow class of state retirees. *Id.* at 14a-15a. The court emphasized that only a narrow group of state employees received the exemption, and thus concluded that the "intent of the exemption contained in Section 12(c)(6) was to give a benefit to a narrow class of state retirees" and not to discriminate against federal employees based on the source of their income. *Id.* at 15a. Mimicking its reasoning in *Brown*, the court below examined the "totality of the circumstances" and determined that Mr. Dawson received more favorable tax treatment than various other groups of non-similar state retirees. *Id.* at 15a-16a. Therefore, it upheld Section 12(c)(6), concluding that it was not intended to discriminate against former federal marshals. *Id.* at 16a.

This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

Review is warranted for four reasons.

First, the decision below exacerbates an existing division among state courts of last resort regarding whether this Court's decisions in *Davis*, 489 U.S. at 803, and *Jefferson County*, 527 U.S. at 434, and the

doctrine of intergovernmental tax immunity[2] bar states from exempting groups of state retirees from taxation while discriminating against similarly-situated federal retirees based on the source of their income.

Following *Davis*, three state courts of last resort have held that such discriminatory exemptions violate the doctrine of intergovernmental tax immunity. Conversely, three state courts of last resort have held post-*Davis* that states may exempt groups of state retirees from taxation while taxing similarly situated federal retirees, reasoning that *Davis* applies only to prohibit a blanket tax exemption for all state retirees, not an exemption for a limited group of state retirees. Furthermore, other cases decided after *Davis* evidence that this Court's intervention is necessary to define the precise parameters and scope of *Davis*.

Second, the decision below is directly contrary to this Court's decisions in *Davis* and *Jefferson County*. In *Davis*, this Court held that whenever a state statute is alleged to violate the doctrine of intergovernmental tax immunity by favoring state employees over similarly situated federal employees, the discriminatory treatment "must be justified by significant differences between the two classes." 489 U.S. at 816. Nothing in *Davis* suggests that its holding is limited to blanket tax exemptions granted to all state

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[2] This Court has held in *Davis* that "the retention of immunity in [4 U.S.C.] § 111 is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." 489 U.S. at 813. Therefore, this petition treats the statutory section and the intergovernmental tax immunity doctrine as coextensive.

employees. To the contrary, in *Jefferson County*, this Court clarified that discriminating against even "a subcategory" of federal employees violates intergovernmental tax immunity. 527 U.S. at 443. Yet the court below erroneously reasoned that because the West Virginia law at issue was not a "blanket exemption" granted to "*all* state retirees," this Court's precedent on intergovernmental tax immunity did not apply. Pet.App.10a. This reasoning was erroneous. and other state courts of last resort have adopted this flawed reasoning in upholding discriminatory tax statutes.

Third, this is a recurring and important issue that this Court should address. Unsettled questions about the proper form of state tax schemes post-*Davis* have resulted in a split of authority and an explosion of litigation in state courts challenging restructured state tax schemes. Lacking specific guidance, state courts have reached different conclusions, which has resulted in inconsistent and ever-changing tax and benefits schemes across states. This uncertainty affects millions of federal, state, and local retirees nationwide. Furthermore, allowing states to impose "narrow" tax exemptions for swaths of state employees while strapping federal employees with the state tax burden imposes new financial risks for the burgeoning federal retiree population. Under the flawed reasoning of the court below, all states could adopt discriminatory tax exemptions favoring *limited groups of state employees* while taxing similarly situated federal employees to avoid challenges under *Davis* and the intergovernmental tax immunity doctrine. The "narrow class" of beneficiaries argument essentially suggests that taxing systems imposing

just a "small" discrimination are not prohibited by *Davis*.

Finally, this case presents an ideal vehicle to resolve this issue. It is undisputed that there are no significant differences between the exempted state law enforcement officers and federal marshals like Mr. Dawson; therefore, the question presented only requires the resolution of a legal issue. Pet.App.22a. Furthermore, the Supreme Court of Appeals of West Virginia's erroneous reasoning below and in *Brown* has been adopted by two other state courts of last resort in decisions upholding state tax statutes that clearly violate the doctrine of intergovernmental tax immunity, as set forth in *Davis*. This Court's intervention is necessary to avoid further reliance on these erroneous decisions.

I. THE DECISION BELOW DEEPENS AND PERPETUATES A POST-*DAVIS* SPLIT OVER WHETHER STATES MAY EXEMPT THE RETIREMENT INCOME OF STATE RETIREES WHILE TAXING THE RETIREMENT INCOME OF SIMILARLY SITUATED FEDERAL RETIREES

The decision below exacerbates a split of authority that persists post-*Davis* regarding whether states may exempt groups of state retirees from state tax while taxing similarly situated federal retirees.

Davis held that state tax statutes that "favor[] retired state and local government employees over retired federal employees" violate the principles of intergovernmental tax immunity. 489 U.S. at 817. In the aftermath of *Davis*, three state courts of last resort faithfully applied this Court's reasoning and

struck down tax statutes that favored groups of state retirees over federal retirees. On the other hand, three state courts of last resort have held post-*Davis* that states may exempt limited groups of state retirees while taxing similarly situated federal retirees. Courts that have upheld such discriminatory tax treatment justify it on the basis that *Davis* dealt with a blanket tax exemption for all state retirees, not an exemption for a limited group of state retirees. Therefore, according to those courts, *Davis* does not apply, one need not examine the federal *source* of the compensation under consideration, and the West Virginia Supreme Court's decision in *Brown* is instead instructive.

A. Three State Courts of Last Resort Have Held Post-*Davis* That States Are Not Able to Exempt Groups of State Retirees From State Income Tax While Not Exempting Similarly Situated Federal Retirees

After this Court's decision in *Davis*, three state courts of last resort have correctly held that state tax laws exempting state retirees from tax while not exempting similarly situated federal retirees violate the intergovernmental tax immunity doctrine or 4 U.S.C. § 111.

1. **Arkansas.** In *Pledger v. Bosnick*, Arkansas residents who were federal retirees and retirees from other states' agencies filed a lawsuit contending that provisions of the Arkansas tax code violated the doctrine of intergovernmental tax immunity. 811 S.W.2d 286, 288 (Ark. 1991), *abrogated on other grounds by State, Dep't of Fin. & Admin. v. Staton*, 942 S.W.2d

801, 806 (Ark. 1996). Specifically, the plaintiffs argued that tax provisions that fully exempted retirement income received by retirees from the Arkansas Public Employees, Teachers, State Highway Police, and State Highway Employees Retirement Systems, while allowing only a $6,000 exemption for all other retirees, discriminated against the plaintiffs based on the source of their income. *Id.*

The Arkansas Supreme Court agreed. Citing *Davis*, the court explained that the key question at issue was whether "the tax levied by the State of Arkansas discriminate[d] against the taxpayers because of the *source* of the pay or compensation." *Id.* at 291. Under *Davis*, if the court found that the Arkansas tax scheme discriminated "against retirees from the federal government . . . when compared to the treatment given retirees from the State of Arkansas" it "must find that the tax is in violation of the Constitutional Doctrine of Intergovernmental Tax Immunity." *Id.* The court said nothing about *Davis* being applicable only to challenges of blanket tax exemptions for state employees.

The court held that the tax levied upon the compensation of the military retirees and retirees from other states was "discriminatory" when compared to the tax "levied upon the compensation of the Arkansas civil service retirees." *Id.* at 292. In other words, "the tax discriminate[d] based upon the source of the payment, since the source of one payment is the State of Arkansas and the source of the military pay is the federal government." *Id.* Thus, the court held that the Arkansas tax ran afoul of *Davis* and violated principles of intergovernmental tax immunity.

2. **Colorado.** In *Kuhn v. State Department of Revenue of State of Colorado*, military retirees challenged portions of a Colorado taxing scheme that exempted $2,000 of military retirement benefits for retirees under the age of 55, but exempted $20,000 of retirement benefits for state and private retirees under the age of 55. 817 P.2d 101, 103 (Colo. 1991) (en banc) (citing Colo. Rev. Stat. §§ 39-22-104(4)(g), 39-22-104(4)(f)). The plaintiffs alleged that the taxing scheme violated 4 U.S.C. § 111 and the principles of intergovernmental tax immunity. *Id.* at 104. The State argued that the taxing scheme "did not discriminate based on the source of the income" and even if it did, "it was justified by significant differences between military retirement pay and other classes of retirement benefits." *Id.* at 106.

Relying on *Davis*, the Supreme Court of Colorado agreed with the plaintiffs, holding that the taxing scheme "did discriminate between taxpayers based on the source of their income." *Id.* at 108. The court explained that *Davis* "prohibit[s]" taxes "that discriminate between state and federal workers based on the source of the income" unless the inconsistent treatment is justified by significant differences between the classes. *Id.* at 107 (citing *Davis*, 489 U.S. at 816). The court said nothing to indicate that the holding in *Davis* is limited to blanket tax exemptions.

The court rejected the State's argument that discriminatory treatment was justified by the higher benefits received by retired military members than state retirees. *Id.* Indeed, the court stated that the financial argument was foreclosed by *Davis*, which "rejected" the "assertion that the fact that state re-

tirement benefits were 'less munificent' than federal benefits was a significant difference" that justified the disparate tax treatment. *Id.* at 109. Therefore, the court concluded that the state failed to show significant differences that justified the discriminatory tax scheme, and the tax scheme violated intergovernmental tax immunity and 4 U.S.C. § 111. *Id.*

3. **Missouri.** In *Hackman v. Director of Revenue*, taxpayers who had paid state income tax on federal military retirement benefits filed claims for a refund after this Court's decision in *Davis*. 771 S.W.2d 77, 79 (Mo. 1989). Missouri's taxation scheme allowed state retirees to exempt their retirement income from state income tax while not providing the same exemption to federal retirees. *Id.* Unlike the blanket tax exemption at issue in *Davis*, the Missouri taxing scheme provided narrow income tax exemptions throughout the tax code in the specific statutes that create the state's myriad retirement systems. *Id.* at 80. Nonetheless, the court reasoned that "the effect of Missouri's scattered retirement benefit exemption statutes is identical to that of Michigan's exemption statute for purposes of a *Davis* analysis." *Id.* In other words, although Missouri's tax code included several narrow statutory exemptions for subgroups of state employees—and not one large blanket exemption—*Davis* still controlled.

Citing *Davis*, the court determined (and the state conceded) that its taxing scheme violated "principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees." *Id.* (citing *Davis*, 489 U.S. at 817). The court struck down the taxing scheme.

B. Three State Courts of Last Resort Have Held Post-*Davis* That States Are Able to Exempt Groups of State Retirees From State Income Tax While Not Exempting Similarly Situated Federal Retirees

After this Court's decision in *Davis*, three state courts of last resort have erroneously held that state tax laws exempting groups of state retirees from state income tax while taxing similarly situated federal retirees did not violate the intergovernmental tax immunity doctrine or 4 U.S.C. § 111. To arrive at this conclusion, each of these courts has cited the West Virginia Supreme Court's *Brown* decision, which held that *Davis* does not control where states exempt a limited class of state employees from taxation, as opposed to providing a blanket tax exemption for all state employees.

1. a. **West Virginia**. In *Brown v. Mierke*, federal military retirees brought an action challenging Section 12(c)(6) (the same statute challenged by the Dawsons here), which provides for a modification reducing federal adjusted gross income for state income tax purposes by the entire amount a taxpayer receives from "pensions and annuities . . . under any West Virginia police, West Virginia firemen's retirement system or the West Virginia Department of Public Safety Death, Disability and Retirement Fund." 443 S.E.2d 462, 463 (W. Va. 1994). Federal tax law includes military pensions in adjusted gross income ("AGI"), and federal AGI constitutes AGI for the purposes of the West Virginia personal income tax, subject to certain exemptions. *Id.* Therefore, because they are counted in federal AGI, military pensions are likewise included in West Virginia AGI

tirement benefits were 'less munificent' than federal benefits was a significant difference" that justified the disparate tax treatment. *Id.* at 109. Therefore, the court concluded that the state failed to show significant differences that justified the discriminatory tax scheme, and the tax scheme violated intergovernmental tax immunity and 4 U.S.C. § 111. *Id.*

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and thus West Virginia personal income tax is imposed on military retirement pay. *Id.*

A disparity exists, however, between the tax exemptions provided to military retirees on one hand and West Virginia state retirees on the other. Subject to certain limited exclusions, military retirees are required to report their retirements as income on their tax returns. *Id.* By contrast, Section 12(c)(6) allows state retirees to exempt *all amounts* received from the West Virginia police, West Virginia firemen's retirement system or the West Virginia Department of Public Safety Death, Disability and Retirement Fund. W. VA. CODE § 11-21-12(c)(6). Because of this disparity, retired military personnel filed an action seeking to establish whether the West Virginia tax scheme violated 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity.

The Supreme Court of Appeals of West Virginia upheld the taxing scheme. Without legal support, the court explained that *Davis* did not control its analysis. Instead, because the "intent" of the West Virginia tax scheme was to "give a benefit to a very narrow class of former state and local employees" and not to "discriminate *against* federal retirees," the court held that *Davis* did not apply. *Brown*, 443 S.E.2d at 466. While acknowledging that focusing on who benefits from the exemption instead of who it excludes may "at first appear to be a distinction without a difference," the court relied on three facts to conclude that West Virginia did not intend to discriminate against retired military personnel. *Id.* *First*, the retired military personnel were treated more favorably than West Virginians who had retired from civilian occupations because they were allowed

some tax exemption of their retirement benefits. *Id.* at 467. *Second*, retired military personnel were treated equally with all persons retired from the West Virginia Public Employees Retirement System and the West Virginia Teachers Retirement System. *Id.* *Third*, along with state public employees and teachers, military retirees were treated "substantially more favorably" than persons retired from the West Virginia Judicial Retirement System. *Id.* From these facts, the court found it "difficult to infer that *any* of the pernicious dynamics that either the ancient doctrine of intergovernmental tax immunity or 4 U.S.C. § 111 are designed to remedy is implicated." *Id.* at 468.

Therefore, the court ignored *Davis* and upheld Section 12(c)(6).

b. In the decision below, the West Virginia Supreme Court again upheld Section 12(c)(6) against a challenge based on intergovernmental tax immunity and 4 U.S.C. § 111. Pet.App.16a. This time, however, the challenge was raised by Mr. Dawson—a former U.S. Marshal and deputy U.S. Marshal—who received retirement benefits from FERS. *Id.* at 4a. FERS income does not enjoy a complete exemption from taxation under West Virginia's state income taxation scheme. *See* § 11-22-12(c)(6); *see also* Pet.App.2a-3a. Mr. Dawson and his wife argued that the Tax Commissioner's preferential treatment of the retirement income of some state and local law enforcement officers was, in fact, discrimination against federal law enforcement officers in violation of 4 U.S.C. § 111. *Id.* at 4a-5a.

The court below disagreed. Drawing the same flawed distinction it drew in *Brown*, the court rea-

soned that West Virginia's "limited" tax exemptions differed from the taxing schemes invalidated by the Supreme Court in *Davis* and its progeny because "there is no intent in the West Virginia scheme to discriminate *against* federal retirees." Pet.App.10a. To determine the statute's intent, the court employed the same flawed reasoning that it used in *Brown*. *First*, the court reasoned that Mr. Dawson received more favorable tax treatment than state civilian retirees under West Virginia law. *Id.* at 15a. *Second*, unlike West Virginia civilian retirees, federal retirees are allowed to exempt $2,000 from their taxable income. *Id.* (citing W. VA. CODE § 11-21-12(c)(5)). *Third*, the court noted that Mr. Dawson also received more favorable tax treatment than retired state justices and circuit judges. *Id.* *Finally*, the court noted that Mr. Dawson received the same tax treatment as recipients of benefits from PERS and the Teachers Retirement System. *Id.*

In short, the court explained that Section 12(c)(6) gives a benefit to a "very narrow class of former state and local employees, and that benefit was not intended to discriminate against former federal marshals." *Id.* at 16a. Therefore, because the statute did not provide a blanket exemption for all state employees, the West Virginia Supreme Court again ignored *Davis* and upheld Section 12(c)(6).

2. **New Mexico.** In *Alarid v. Secretary of N.M. Department of Taxation and Revenue*, retired employees of the University of California and their spouses sought a refund for taxes paid on their retirement benefits between the years 1986 and 1989. 878 P.2d 341, 343 (N.M. 1994). The plaintiffs were New Mexico residents who worked at Los Alamos

National Laboratory, which was operated by the State of California through a contract with the federal government. *Id.* Therefore, although plaintiffs were residents of the state of New Mexico and worked in the state, they received retirement benefits through the State of California. *Id.*

During the same time period the plaintiffs were taxed on their retirement income, the retirement income of former employees of the New Mexico state educational institutions was exempt from state taxation. *Id.* Because the exemption for state educators did not extend to the employees of the National Laboratory, the plaintiffs claimed that the taxing scheme violated the intergovernmental tax immunity doctrine. *Id.* at 343-44.

The New Mexico Supreme Court disagreed, holding that the tax on plaintiff's retirement income did not violate the intergovernmental tax immunity doctrine. *Id.* at 345-46. Citing the West Virginia Supreme Court's decision in *Brown*, the court reasoned that granting narrow tax exemptions to state employees does not pose the same concerns as the blanket exemptions struck down in *Davis*: "[t]he fact that the State has chosen to exempt from state tax one limited class of state retirees does not mean Plaintiffs are being illegally discriminated against." *Id.* (citing *Brown*, 443 S.E.2d at 462). The court determined that the plaintiffs were in the same position as the majority of New Mexico citizens whose retirement incomes were also taxed. *Id.* at 347. Therefore, the court reversed the lower court's grant of summary judgment in favor of plaintiffs and held that the taxation scheme did not violate the doctrine of intergovernmental tax immunity. *Id.*

3. **Massachusetts.** In *Cooper v. Commissioner of Revenue*, Massachusetts taxpayers who paid state income tax on federal military pension income brought claims for abatement of that tax under 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity. 658 N.E.2d 963, 963 (Mass. 1995). Among other claims, they argued that a Massachusetts statutory "grandfather" provision violated 4 U.S.C. § 111 because it exempted "income from a noncontributory annuity or pension allowance received on account of service in a police or fire department of a town by a person . . . who was in the employ of such . . . department at the time of the establishment of the contributory retirement system in 1936 and 1937." *Id.* at 965. Because the statute exempted only the retirement income of certain state police or fire personnel and did not extend to similarly situated federal employees, the taxpayers argued that it violated 4 U.S.C. § 111. *Id.*

The court disagreed. It reasoned that because the tax provision at issue favored a "small and dwindling class" of state retirees, it could not constitute "discrimination against federally funded benefits." *Cooper*, 658 N.E.2d at 965 (citing *Brown*, 443 S.E.2d at 462; *Alarid*, 878 P.2d at 341). Therefore, the court relied upon the West Virginia and New Mexico Supreme Courts' precedent and ignored *Davis* because the tax statute at issue was not a blanket tax exemption for all state employees. The court held that the statute favored a group of state retirees not because their "source of the pay or compensation is the Commonwealth rather than the Federal government," but because of "the basis of occupation (police and firefighters) and the date of first employment (before

1938)." *Id.* (internal quotations omitted). The court upheld the discriminatory tax statute. *Id.*

C. Other Cases That Have Addressed Related Post-*Davis* Tax Issues Likewise Deepen the Split of Authority

The *Davis* decision left many questions unanswered regarding how states should conform their tax schemes to comply with this Court's holding. The Court explained that the issue "could be resolved either by extending the tax exemption to retired federal employees (or to all retired employees), or by eliminating the exemption for retired state and local government employees." *Davis*, 489 U.S. at 818. But the Court left to the states the ultimate decision of how to comply with its "mandate of equal treatment." *Id.*

1. In the aftermath of *Davis*, certain states have established taxation schemes that are plainly inconsistent with the rationale of *Davis* and its progeny. In some cases, states allow tax exemptions or deductions for only specific types of contributions made to retirement plans. *See, e.g.*, *Kerr v. Killian*, 84 P.3d 446 (Ariz. 2004) (state exempted state employee mandatory contributions to retirement plans "picked up" or paid by a state employer but did not exempt federal, mandatory employee contributions to plans); *Filios v. Comm'r of Revenue*, 615 N.E.2d 933 (Mass. 1993) (state exempted from taxation "contributory" state retirement benefits, which were 90% employer provided and 10% employee provided, but imposed tax on federal employer-provided military retirement compensation); *Witte v. Dir. of Revenue*, 829 S.W.2d 436 (Mo. 1992) (en banc) (state allowed deduction for

contributions made by individual earners to public retirement funds but did not allow deduction for mandatory contributions to federal Civil Service Retirement System). Unlike in *Davis*, these taxing schemes do not expressly discriminate against federal retirees based on the source of their income. Yet the *practical effect* of these schemes is to tax federal employees less favorably than state employees.

The dispositive factor in these cases was that the statutes did not discriminate against federal employees based on "who pays" them, but instead taxed a specific type of contribution to a retirement plan. *See Kerr*, 84 P.3d at 455 ("[T]he difference is not who pays the employees, but the voluntary choice made by the employer as to whether the contributions should be picked up."); *Filios*, 615 N.E.2d at 936 ("The Commonwealth does not impose the tax based on the source of the income[.]"); *Witte*, 829 S.W.2d at 441 ("Section 143.141 does not single out employees of the state and its political subdivisions for favorable tax treatment[.]"). Therefore, three state courts of last resort have upheld tax statutes that, in practice, tax state employees more favorably than federal employees. This is plainly contrary to *Davis*.

2. a. In response to *Davis*, other states eliminated tax *exemptions* for state and local government retirees and simultaneously increased state retirement *benefits* to compensate state retirees for the loss of the tax exemption. *See generally*, WALTER HELLERSTEIN, JOHN A. SWAIN, STATE TAXATION ¶ 22.04[3][a][i] (3d ed. 2017) (hereinafter "STATE TAXATION") (discussing states that increased state employee retirement benefits in response to *Davis*). Litigation ensued, as federal retirees challenged these

benefits increases as "tax rebates in disguise" under the doctrine of intergovernmental tax immunity. Courts split as to the legality of such benefits increases.

b. Four state courts of last resort held that an increase in state employee retirement benefits enacted after the repeal of statutes exempting their retirement income did not violate the doctrine of intergovernmental tax immunity. *See Ragsdale v. Dep't of Revenue*, 895 P.2d 1348 (Or. 1995); *Ward v. South Carolina*, 590 S.E.2d 30 (S.C. 2003); *Thompson v. Utah State Tax Comm'n*, 112 P.3d 1205 (Utah 2004); *Weiss v. McFadden*, 148 S.W.3d 248 (Ark. 2004). These courts generally reasoned that this Court's decision in *Davis* and the doctrine of intergovernmental tax immunity relate only to discrimination *in taxation* based on the source of income—they do not "deprive a state of its sovereignty to establish the level of its employees' compensation[.]" *Ward*, 590 S.E.2d at 32; *Thompson*, 112 P.3d at 1207 ("[W]e find nothing in *Davis* even remotely suggesting that a state cannot compensate its employees at whatever rate it sees fit[.]"). Therefore, because the state statutes at issue only added retirement *benefits*—and did not expressly address taxation—the courts did not apply *Davis* and upheld the benefits increases.

c. On the other hand, two state courts of last resort held that state increases in state retiree benefits in response to *Davis* violated the doctrine of intergovernmental tax immunity. *See Vogl v. Dep't of Revenue*, 960 P.2d 373 (Or. 1998); *Sheehy v. Pub. Employees Ret. Div.*, 864 P.2d 762 (Mont. 1993). In *Vogl*, the Supreme Court of Oregon—without overruling its contrary decision in *Ragsdale*—held that a statu-

tory increase in state retiree benefits violated the doctrine of intergovernmental tax immunity because the benefit increase was more narrowly tailored to directly compensate the state retirees for the nullified tax exemption than the benefits increase in *Ragsdale*. 960 P.2d at 376, 379-81, 393. Similarly, in *Sheehy*, the Supreme Court of Montana held that a statutory increase in state employee retirement benefits violated the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111. 864 P.2d at 767-68. The court concluded that the adjustment in benefits was actually a "partial tax rebate denominated otherwise in an attempt to evade the requirements of federal law[.]" *Id.*

The Oregon and Montana Supreme Courts viewed the benefits increases as tied expressly to attempts to circumvent *Davis*, not merely as an increase in compensation benefits. *See Vogl*, 960 P.2d at 380 ("[A]s the state moves closer to replacing the lost net income on a dollar-for-dollar basis, the fact that the increase is in fact a tax rebate, rather than a general increase in compensation to 'make up' for lost net income, becomes more apparent."); *Sheehy*, 864 P.3d at 768 ("Rather than comply with 4 U.S.C. § 111 . . . the legislature chose to equalize the burden by taxing all retirement benefits, subject to the phase-out exemption discussed above. Within the same legislative enactment, the legislature provided for an adjustment payment to state retirees who are Montana residents. The State's argument that the two portions of the bill are not related defies logic."). Therefore, because the benefits increases were actually discriminatory tax rebates in disguise, they violated the doc-

trine of intergovernmental tax immunity as outlined by this Court in *Davis*.

3. These cases confirm that state courts are having difficulty applying *Davis* and its progeny and that this Court's intervention is essential to clarify their parameters and scope. Furthermore, this Court should clarify that ignoring *Davis* and "favoring retired state and local government employees over retired federal employees" is impermissible and violates the doctrine of intergovernmental tax immunity—even where states craft creative taxing schemes to mask that illegal purpose. *Davis*, 489 U.S. at 817.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *DAVIS* AND *JEFFERSON COUNTY*

The decision below is directly contrary to this Court's precedent. Indeed, this Court held in *Davis*, 489 U.S. at 817, and reiterated in *Jefferson County*, 527 U.S. at 442-43, that a state may not tax a federal retiree's pension and other retirement benefits less favorably than the retirement benefits of similarly situated state retirees. The decision below acknowledged this precedent, but then erroneously determined that it did not apply because *Davis* dealt with a blanket tax exemption for all state employees, and the West Virginia statute at issue (Section 12(c)(6)) exempted only a subset of state employees. Pet.App.10a. This distinction is erroneous.

1. This Court broadly held that taxes favoring retired state and local government employees over similarly situated retired federal employees violate the doctrine of intergovernmental tax immunity.

In *Davis*, this Court's holding was clear: "the imposition of a heavier tax burden on those who deal with one sovereign than is imposed on those who deal with the other" must be justified by demonstrating that the disparate treatment is the result of "significant differences between the two classes." 489 U.S. at 816-17. In that case, the Michigan taxing scheme at issue exempted retirement benefits received from the state or its political subdivisions, but did not exempt federal retirement benefits. *Id.* at 806. The state attempted to justify the discriminatory treatment by arguing that the state has an interest in hiring qualified civil servants and that the state retirement benefits are "less munificent" than those offered by the federal government. *Id.* at 816.

This Court disagreed that the manufactured "differences" warranted the unequal tax treatment. *First*, the Court stated that the state's goal of hiring qualified candidates was "beside the point," because it was a *reason for* the preferential treatment of state employees, not a *significant difference* between state and federal employees. *Id.* *Second*, the Court rejected the notion that differences in value between state and federal retirement benefits justified preferential tax treatment for state employees. *Id.* at 816-17. It reasoned,

> [a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits . . . ; rather, it would discriminate on the basis of the amount of benefits received by the individual retirees.

Id. at 817. Because the state was unable to show that significant differences between state and federal retirees justified the unequal tax treatment, this Court held that the taxing scheme violated principles of intergovernmental tax immunity. *Id.*

In *Jefferson County*, this Court reiterated its holding in *Davis*. 527 U.S. at 442-43. Although this Court ultimately determined that the occupational tax at issue did not violate the doctrine of intergovernmental tax immunity, it again explained that "a state tax exempting retirement benefits paid by the State but not those paid by the Federal Government" violates the doctrine of intergovernmental tax immunity. *Id.* at 442. This Court cautioned—"[s]hould Alabama or Jefferson County authorities take to exempting state officials while leaving federal officials (or *a subcategory of them*) subject to the tax, that would indeed present a starkly different case" violating the doctrine of intergovernmental tax immunity. *Id.* at 443 (emphasis added). The key is whether the tax discriminates against federal employees "based on the federal *source* of their pay or compensation." *Id.* at 442-43.

2. The decision below is directly contrary to *Davis* and its progeny. Indeed, the court below upheld a West Virginia tax exemption that applied only to four state law enforcement retirement plans while not extending the same exemption to similarly situated federal law enforcement officials. Pet.App.16a.

While acknowledging this Court's decision in *Davis*, the court below chose to disregard it. Instead, it determined—without supporting authority—that *Davis* does not apply to state laws that exempt only a "*narrow* class" of state retirees while discriminating

against similarly situated federal retirees. *Id.* at 10a. It implied that small tax discriminations are permissible. But nothing in *Davis* supports that conclusion. In fact, this Court in *Jefferson County* clarified that the principles of intergovernmental tax immunity apply even when a "subcategory" of federal officials are taxed unequally to their state counterparts. 527 U.S. at 443.

Furthermore, the court below reasoned that the tax exemption was not *intended to discriminate* against Mr. Dawson, but instead was intended to "*benefit* . . . a narrow class of state retirees." Pet.App.15a. However, this reasoning is circular and could be used to support any discriminatory taxing scheme—including the scheme invalidated in *Davis*—that intends to *benefit* a group of state employees while not extending it to federal employees. In *Davis*, this Court did not apply a test whether a given tax provision was "intended" to burden federal employees. Rather, this Court looked to the "source of those benefits."

Finally, the court below erroneously avoided the question whether significant differences could justify the disparate treatment, determining that it was unnecessary to reach that question. However, it was "undisputed" in this case that "there are no significant differences between Mr. Dawson's powers and duties as a U.S. Marshal and the powers and duties of the state and local law enforcement officers listed in [Section 12(c)(6)]." Pet.App.22a. Thus, under the proper analysis, Dawson could not be treated differently from the similarly situated state law enforcement retirees whose income is entirely exempt.

Accordingly, the decision below, which upholds a state taxing scheme that favors state retirees and discriminates against similarly situated federal retirees based solely on the source of their income, contravenes clear precedent of this Court and should be reversed.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

The West Virginia Supreme Court's decision is at odds with this Court's precedent and with decisions of other state courts of last resort. Since *Davis*, litigation regarding the proper structure of tax exemptions and benefits for state and federal employees has exploded in state courts across the country. The result has been inconsistent and ever-changing tax exemption schemes for government retirees nationwide. Without this Court's intervention, the growing population of both federal and state retirees who budget based on a fixed income will be subjected to continued uncertainty.

1. The issue presented in this case has consistently arisen in state courts after *Davis*. In response to this Court's *Davis* decision, states took varied approaches to restructuring their tax laws to achieve equal treatment between state and federal retirees. *See supra* Section I; *see also* Dan T. Coenen & Walter Hellerstein, *Suspect Linkage: The Interplay of State Taxing and Spending Measures in the Application of Constitutional Antidiscrimination Rules*, 95 MICH. L. REV. 2167, 2178-79 (1997) (discussing various approaches to retirement taxation and benefits schemes taken by states after *Davis*); STATE TAXATION ¶ 22.04[3][a] (same). This rush to change state

tax and benefits schemes in response to *Davis* resulted in varied tax treatment for retirees depending on their state of residence. *See, e.g.*, NATIONAL ACTIVE AND RETIRED FEDERAL EMPLOYEES ASSOCIATION, STATE TAX TREATMENT OF FEDERAL ANNUITIES (Apr. 2017), https://www.narfe.org/pdf/StateTaxRoundupTaxYear2015.pdf (giving state-by-state breakdown of taxation of federal annuities).

As a result of these widespread changes, a "nationwide outpouring of litigation" ensued where federal retirees challenged the various revised state tax and benefits schemes. *See* STATE TAXATION ¶ 22.04[3][a] (discussing "considerable litigation" in response to *Davis*). Indeed, a review of the caselaw shows that there are 58 state court of last resort decisions that discuss "intergovernmental tax immunity" and cite *Davis*. This litigation surge resulted in a split of authority and inconsistent treatment of federal and state retirees across states. *See supra* Section I.

2. Open questions regarding the proper structure for state retirement tax and benefits schemes affect a large segment of the U.S. population. For example, as of 2014, there were over 1.5 million federal retirees living in states that tax federal retirement income, and that number continues to grow. *See* Janet Kopenhaver, *Population of Federal Employees by Congressional District and County (2014)*, EYE ON WASHINGTON, http://eyeonwashington.com/few_map_2014/index.html (last visited Sept. 18, 2017); *see also* CONGRESSIONAL BUDGET OFFICE, CIVIL SERVICE RETIREMENT AND DISABILITY FUND - CBO MARCH 2012 BASELINE, https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/dataandtechnicalinforma

tion/43067_CivilServiceRetirementDisabilityFund.pdf (last visited Sept. 18, 2017) (projecting approximately 10% growth in number of federal retirees between 2012 and 2022). Furthermore, in 2014, state and local governments employed around 7.4 million full-time equivalent workers (approximately 232 public employees for every 10,000 Americans). When teachers and others working in education are included in the 2014 total, it more than doubles to about 16.2 million non-federal public employees nationwide. *See* Governing.com, *States With Most Government Employees: Totals and Per Capita Rates*, http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html (last visited Sept. 18, 2017). Open questions regarding the proper structure of state tax and benefits schemes related to public retirement income and ever-growing tax disparities between states affect millions of retirees across the United States and require resolution.

3. Finally, allowing a state like West Virginia to perpetuate a tax statute that discriminates against federal employees in favor of state employees creates troubling precedent. As the population of federal retirees continues to increase, cash-strapped states may choose to follow the lead of West Virginia, Arizona, and Massachusetts and impose taxes that favor small groups of state retirees while taxing similarly situated federal retirees to cover state costs. But this discriminatory taxation of federal employees to pad states' coffers is exactly the behavior that the doctrine of intergovernmental tax immunity prohibits. *Davis*, 489 U.S. at 814 (explaining that "private entities or individuals who are subjected to discrimi-

natory taxation on account of their dealings with a sovereign" are entitled to "receive the protection of the constitutional doctrine" of intergovernmental tax immunity). This Court's intervention is necessary to ensure that discriminatory tax statutes like Section 12(c)(6) are not used to increase states' revenue at the expense of the federal government and its employees.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO DECIDE THIS IMPORTANT QUESTION

This petition presents an ideal vehicle to decide the question presented. *First*, it is undisputed that there are no significant differences between the state law enforcement officers exempted under Section 12(c)(6) and federal marshals like Mr. Dawson. Pet.App.22a. There is no factual dispute for this Court to resolve, and the intergovernmental tax immunity question presented is purely a question of law.

Second, the West Virginia Supreme Court's erroneous determination that this Court's holding in *Davis* is limited only to *blanket tax exemptions* for state employees has been erroneously relied upon by other state courts of last resort. Indeed, both the New Mexico Supreme Court and the Massachusetts Supreme Court have expressly cited the West Virginia Supreme Court's *Brown* decision to uphold state tax exemptions for *narrow groups* of state employees that discriminate against similarly situated federal employees. *See Alarid*, 878 P.2d at 345-46; *Cooper*, 658 N.E.2d at 965. This case presents an opportunity for this Court to correct the West Virginia Supreme Court's misstatement of the holding in *Davis*

before other state courts rely on *Brown* or the decision below to uphold a discriminatory taxing scheme that violates the doctrine of intergovernmental tax immunity.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, because the decision below is so plainly contrary to this Court's precedent, summary reversal is warranted.

Respectfully submitted,

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SEPTEMBER 19, 2017

APPENDIX

APPENDIX A

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Dale W. Steager, as
State Tax Commissioner of West Virginia,
Respondent Below, Petitioner

vs) **No. 16-0441** (Mercer County 15-C-326)

James Dawson and
Elaine Dawson,
Petitioners Below, Respondents

FILED
May 17. 2017
[illegible]
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The Tax Commissioner for the State of West Virginia, petitioner Dale W. Steager,[1] by counsel Katherine Schultz and L. Wayne Williams, appeals a March 31, 2016, order of the Circuit Court of Mercer County. In that order, the circuit court held that a tax exemption available only to beneficiaries of certain state retirement plans unlawfully discriminated against certain federal retirees. The taxpayer-respondents, James and Elaine Dawson, by counsel Michael W. Carey and David R. Pogue, filed a

[1] Mr. Steager replaced Mark W. Matkovich as Tax Commissioner in January 2017.

response in favor of the circuit court's order. The Tax Commissioner filed a reply.

The Court has considered the parties' briefs and oral arguments, as well as the record on appeal. Upon consideration of the standard of review and existing precedent, the Court finds no substantial question of law. This case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion. A memorandum decision reversing the circuit court's order is therefore appropriate under Rule 21 of the Rules of Appellate Procedure.

Since 1939, Congress has permitted states to tax the income and the retirement benefits of former United States government employees. However, Congress allows state taxes upon federal retirement benefits only "if the taxation does not discriminate . . . because of the source of the pay or compensation." 4 U.S.C. § 111 [1998].

West Virginia imposes taxes upon the government-provided retirement income of most local, state and federal employees who reside in this state. West Virginia taxes the income of retired local and state employees received from the West Virginia Public Employees Retirement System ("PERS") and the State Teachers Retirement System ("TRS"); it also taxes the income of retired federal employees received from any federal or military retirement system. W.Va. Code § 11-21-12(c)(5) [2006]. However, West Virginia law permits the recipients of PERS, TRS, or a general federal retirement to exempt up to $2,000 of retirement benefits from their

taxable income. *Id.*[2] The law permits recipients of military retirement benefits to exempt up to $20,000. W.Va. Code § 11-21-12(c)(7)(B). Furthermore, any taxpayer aged 65 or older may exempt up to $8,000 from their taxable income, regardless of the source of that income. W.Va. Code § 11-2112(c)(8).

At issue in this case is a unique tax exemption contained in West Virginia Code § 11-21-12(c)(6) ("Section 12(c)(6)"). Section 12(c)(6) allows the recipients of four small West Virginia retirement plans to exempt from their taxable state income all the benefits received from those plans. According to the Tax Commissioner, the recipients comprise approximately two percent of all state government retirees. The four retirement plans are the Municipal Police Officer and Firefighter Retirement System ("MPFRS"); the Deputy Sheriff Retirement System ("DSRS"); the State Police Death, Disability and Retirement Fund ("Trooper Plan A"); and the West Virginia State Police Retirement System ("Trooper Plan B").[3]

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[2] W.Va. Code § 11-21-12(c)(5) provides, in pertinent part, that a taxpayer may exempt from adjusted gross income "the first two thousand dollars of benefits received under any federal retirement system to which Title 4 U.S.C. § 111 applies[.]"

[3] W.Va. Code § 11-21-12(c)(6) provides:

> (c) *Modifications reducing federal adjusted gross income.* -- There shall be subtracted from federal adjusted gross income to the extent included therein: . . .
>
> (6) Retirement income received in the form of pensions and annuities after the thirty-first day of December, one thousand nine hundred seventy-nine, under any West Virginia police, West Virginia

The taxpayer in this case is James Dawson, who worked most of his career as a deputy U.S. Marshal before being presidentially appointed U.S. Marshal for the Southern District of West Virginia. Mr. Dawson retired from the U.S. Marshals Service on March 31, 2008. During his employment, Mr. Dawson was enrolled exclusively in the Federal Employee Retirement System ("FERS"), and he now receives benefits from FERS. The Tax Commissioner agrees that Mr. Dawson is entitled to exempt at least $2,000 of FERS income from his state taxable income; when he reaches the age of 65, he may exempt up to $8,000. *See* W.Va. Code §§ 11-21-12(c)(5) and -12(c)(8).

For tax years 2010 and 2011, Mr. Dawson and his wife Elaine filed amended tax returns claiming an adjustment exempting Mr. Dawson's FERS retirement income from state income tax pursuant to Section 12(c)(6). The Tax Commissioner refused to allow the Dawsons to claim the exemption.

The Dawsons appealed, and in a hearing before the Office of Tax Appeals asserted that there is no significant difference between state. local. and federal law enforcement officers. Accordingly, the Dawsons contended that the Tax Commissioner's preferential treatment of the retirement income of some (but not

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Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund. the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System. including any survivorship annuities derived from any of these programs, to the extent includable in gross income for federal income tax purposes[.]

all) state and local law enforcement officers pursuant to Section 12(c)(6) was, in fact, discrimination against federal law enforcement officers prohibited by 4 U.S.C. § 111. The Tax Commissioner countered that, under the totality of the circumstances, the Section 12(c)(6) exemption was not designed to discriminate against federal retirees; rather, the intent of the exemption is to give a benefit to a very narrow class of former state and local employees. The Office of Tax Appeals rejected the Dawsons' argument and affirmed the Tax Commissioner's denial of the Section 12(c)(6) exemption.

The Dawsons appealed to the Circuit Court of Mercer County, and the parties repeated their arguments. In an order dated March 31, 2016, the circuit court reversed the decision of the Office of Tax Appeals. The circuit court concluded that the Tax Commissioner's denial of the Section 12(c)(6) exemption to the Dawsons violated 4 U.S.C. § 111. The Tax Commissioner now appeals the circuit court's order.

The issues raised by the parties involve the interpretation of Section 12(c)(6), and an assessment of whether it conflicts with 4 U.S.C. § 111. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). *See also*, Syllabus Point 1, *Appalachian Power Co. v. State Tax Dep't of W.Va.*, 195 W.Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review."). We review the factual findings and

conclusions of the Tax Commissioner under a clearly wrong and abuse of discretion standard. Syllabus Point 5, *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995). "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).

The Tax Commissioner asserts that the circuit court erred in holding that Section 12(c)(6) was an intentionally discriminatory tax against federal marshals. The Tax Commissioner argues that the circuit court failed to take into account the fact that there is no evidence in the record to suggest that Section 12(c)(6) was intended to discriminate against employees or former employees of the federal government. Viewing West Virginia's tax scheme in totality, the Tax Commissioner contends that the record shows there was no calculated scheme or blanket plan to discriminate against retired federal marshals based on the source of their income. As we explain below, we agree and reverse the circuit court's holding.

In *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), the United States Supreme Court analyzed 4 U.S.C. § 111 and discussed its roots in the doctrine of intergovernmental tax immunity. The doctrine traces back to *McCullough v. Maryland*, 17 U.S. 316 (1819), the seminal case where the Supreme Court recognized that Congress was constitutionally empowered to create a "Bank of the United States," and held that the state of Maryland could not impose

a discriminatory tax on the Bank. "Chief Justice Marshall's opinion for the Court reasoned that the Bank was an instrumentality of the Federal Government used to carry into effect the Government's delegated powers, and taxation by the State would unconstitutionally interfere with the exercise of those powers." *Davis*, 489 U.S. at 810.[4]

"[I]ntergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other." *Id.* at 814. Prior to 1939, the "salaries of most government employees, both state and federal, generally were thought to be exempt from taxation by another sovereign under the doctrine of intergovernmental tax immunity." *Id.* "This rule 'was based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax "on" the government because it burdened the government's power to enter into the contract.'" *Id.* at 811 (quoting *South Carolina v. Baker*, 485 U.S. 505, 518 (1988)). However, Congress enacted the "Public Salary Tax Act of 1939" (of which 4 U.S.C. § 111 is a part) "to impose federal income tax on the salaries of all state and local government employees," *Davis*, 489 U.S. at

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[4] The intergovernmental tax immunity doctrine is founded upon the Supremacy Clause (Article VI) of the United States Constitution which provides, in part: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land[.]"

810, and also to expressly permit states to tax the salaries of federal employees. *Id.* at 811.[5]

The Supreme Court found, however, that Congress "did not waive all aspects of intergovernmental tax immunity[.]" *Id.* at 812. The final clause of 4 U.S.C. § 111 provides. "The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." This clause prohibits "state taxes that discriminate against federal employees on the basis of the source of their compensation." *Davis*, 489 U.S. at 811. The Supreme Court concluded that this clause embodies "the modern constitutional doctrine of intergovernmental tax immunity." *Id.* at 813. Under the doctrine, if a heavier tax burden is imposed upon a class of individuals who deal with the federal government than is imposed upon those individuals who deal with state government, then "the relevant inquiry is whether the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.'" *Id.* at 815-816 (quoting *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 383 (1960)).

In *Davis*, the Supreme Court considered a Michigan state tax scheme under which "the retirement benefits of retired state employees are

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[5] Congress adopted the Public Salary Tax Act contemporaneously with the Supreme Court's decision in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), which held that a state could levy non-discriminatory income taxes upon a federal employee. *Davis*, 489 U.S. at 811-812.

exempt from state taxation while the benefits received by retired federal employees are not." *Davis*, 489 U.S. at 806. The Supreme Court specifically identified the state scheme as a "blanket exemption[.]" *Id.* at 817. The Supreme Court had "no difficulty" concluding that federal retirement benefits are a form of compensation protected from discrimination under 4 U.S.C. § 111. *Id.* at 808-809. More importantly, the Supreme Court concluded that the blanket state tax exemption was precluded by 4 U.S.C. § 111 because it "violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees." *Id.* at 817.

Several years later, this Court was presented with an opportunity to apply *Davis* and 4 U.S.C. § 111 to the exemption contained in Section 12(c)(6). In *Brown v. Mierke*, 191 W.Va. 120, 443 S.E.2d 462 (1994), the taxpayers were retirees from the armed forces of the United States who received military pensions.[6] As recipients of a military pension, the Tax Commissioner agreed that the taxpayers were entitled to exempt at least $2,000 of pension income from their state taxable income; if they were over age 65, they could exempt up to $8,000. 191 W.Va. at 121, 443 S.E.2d at 463 (citing W.Va. Code §§ 11-21-12(c)(5) and -12(c)(9)).[7] The taxpayers, however,

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[6] In *Barker v. Kansas*, 503 U.S. 594 (1992), the Supreme Court held that federal military retirement benefits are protected from discrimination under 4 U.S.C. § 111.

[7] Subsequent to our decision in *Brown*, and effective after the 2002 tax year, the recipients of military retirement income may exempt up to $20,000 from their taxable income. W.Va. Code § 11-21-12(c)(7)(B).

claimed they were entitled to exempt *all* of their pension income from state taxation under Section 12(c)(6). The taxpayers argued, "West Virginia's exemption of certain firefighters' and police officers' retirement benefits renders the tax of military pensions prohibited and discriminatory." 191 W.Va. at 123, 443 S.E.2d at 465.

This Court rejected the taxpayers' argument in *Brown*. We noted that in cases where the Supreme Court had found a state tax exemption improperly discriminated against federal retirees under 4 U.S.C. § 111 – such as the Michigan exemption for all state retirees in *Davis* – the state had afforded a blanket exemption to *all* state retirees. Our analysis of Section 12(c)(6) turned on the fact that West Virginia's tax law "exempts a *narrow* class of state employees from state taxation while taxing federal employees." 191 W.Va. at 124, 443 S.E.2d at 466 (emphasis added).

Applying *Davis*, we recognized in *Brown* that "the test of whether a state tax scheme violates 4 U.S.C. § 111 is whether there exists substantial differences between the two classes that justify the discrimination." *Id.* We concluded, however, that West Virginia's limited, multi-tiered series of tax exemptions differed from the "schemes invalidated by the Supreme Court in that there is no intent in the West Virginia scheme to discriminate *against* federal retirees; rather, the intent is to give a benefit to a very narrow class of former state and local employees." *Id.* Summarizing the law, we found in Syllabus Point 2:

> Challenges to a state tax scheme under 4 U.S.C. § 111 can succeed only when one purpose of the challenged scheme is shown to discriminate against the officer or employee because of the *source* of pay or compensation. In determining whether such discrimination exists, a court will look to the totality of the circumstances to ascertain whether the intent of the scheme is to discriminate against employees or former employees of the federal government.

191 W.Va. at 121, 443 S.E.2d at 463.

The *Brown* Court upheld Section 12(c)(6) and found it did not violate 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity. The ruling turned on the totality of the circumstances. First, the record in *Brown* indicated that (as of 1991) 1,624 retired police and firefighters were exempt from taxation by Section 12(c)(6) – "about four percent of all state and local retirees in West Virginia." 191 W.Va. at 121, 443 S.E.2d at 463. Furthermore, an analysis of the entire scheme of tax exemptions showed no intent to discriminate against former employees of the federal government:

> [T]hree facts conclusively demonstrate that no calculated scheme or plan exists to discriminate against retired military personnel based on the source of their income: (1) retired military personnel are treated *more* favorably than West Virginians who have retired from civilian occupations; (2) retired military personnel are treated equally with all persons retired from the West Virginia Public Employees Retirement System and the West Virginia

> Teachers Retirement System; and (3) along with state public employees and teachers, military retirees are treated *substantially more favorably* than persons retired from the West Virginia Judicial Retirement System.

191 W.Va. at 125, 443 S.E.2d at 467. As further evidence of a lack of discriminatory intent, the Court noted:

> That the judges of this Court, statewide elected officials with rather substantial personal political followings and not a few friends in the West Virginia Legislature, are taxed at a substantially *higher* rate than retired members of the Armed Forces of the United States, and both military retirees and the majority of retired state employees are taxed at *lower* rates than West Virginians retired from private sector occupations renders it extraordinarily difficult to infer that *any* of the pernicious dynamics that either the ancient doctrine of intergovernmental tax immunity or 4 U.S.C. § 111 are designed to remedy is implicated.

191 W.Va. at 125-26, 443 S.E.2d at 467-68.

We now turn to the circumstances of this case. Section 12(c)(6) exempts from state taxation the retirement income of many state and local firefighters and law enforcement officers, but not federal marshals. The taxpayer, Mr. Dawson, asserts that there are no significant differences between the powers and duties of state and local law enforcement officers and those of federal marshals. Mr. Dawson contends that this inconsistent tax treatment is proscribed by 4 U.S.C. § 111 because, as the Supreme

Court said in *Davis*, it is not "directly related to, and justified by, significant differences between the two classes." 489 U.S. at 815-816.

The Tax Commissioner counters that the exemption at issue in *Davis* was a global or blanket exemption: the *Davis* tax exemption applied to all state retirees but no federal retirees. In this case, the tax exemption in Section 12(c)(6) applies to a narrow but diverse class of state retirees. Of 53,184 total state government retirees in 2010, less than two percent are eligible for the exemption. For example, the Tax Commissioner showed that in 2010, only 260 retired deputy sheriffs (less than 0.5% of all state retirees) received a pension from the DSRS and were entitled to use the Section 12(c)(6) exemption. An unknown number of other deputy sheriffs, all of whom started working before the DSRS was established in 1998, cannot use the Section 12(c)(6) exemption because they are among the 22,040 retirees receiving a pension from PERS. The Tax Commissioner also showed some state retirement plans provide cost of living increases (like Trooper Plan A or Plan B) while some do not (like MPFRS or DSRS). Some state retirees have contributed to and therefore receive social security (DPRS) while some do not (Trooper Plans A and B). Further, the exemption in Section 12(c)(6) applies to firefighters, but not to emergency medical technicians or paramedics.[8] The Section 12(c)(6) exemption also

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[8] Individuals who provide emergency medical services may receive retirement benefits from PERS or, if employed after 2008, the Emergency Medical Services Retirement System ("EMSRS"). *See* W.Va. Code § 16-5V-1 *et seq.*

does not apply to law enforcement officers employed by the Department of Natural Resources[9] or by the Capitol Police.[10]

It is well settled that tax exemptions are strictly construed against the taxpayer. Where a person claims an exemption from a law imposing a tax, the law is strictly construed against the person claiming the exemption. Syllabus Point 2, *State ex rel. Lambert v. Carman*, 145 W.Va. 635, 116 S.E.2d 265 (1960) ("Where a person claims an exemption from a law imposing a license or tax, such law is strictly construed against the person claiming the exemption."); Syllabus Point 3, *Owens-Illinois Glass Co. v. Battle*, 151 W.Va. 655, 154 S.E.2d 854 (1967) ("Where a person claims an exemption from a law imposing a tax, such law must be construed strictly against the person claiming the exemption."). Under Syllabus Point 2 of *Brown*, the Dawsons were required to establish that the tax scheme established by Section 12(c)(6) discriminates against a federal retiree because of the source of his or her income. However, in determining whether such discrimination exists, this Court "will look to the totality of the circumstances to ascertain whether the intent of the scheme is to discriminate against

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[9] *See* W.Va. Code § 20-7-1 *et seq.* (establishing natural resources police officers and setting duties and powers).

[10] The Capitol Police is formally known as the "Division of Protective Services." *See* W.Va. Code § 15-5D-2 [2002] ("The state facilities protection division within the department of military affairs and public safety shall hereafter be designated the division of protective services. The purpose of the division is to provide safety and security at the capitol complex and other state facilities.").

employees or former employees of the federal government." *Id.*

In light of the totality of the circumstances, and the totality of the structure of West Virginia's tax and retirement scheme, Section 12(c)(6) did not discriminate against Mr. Dawson. The intent of the exemption contained in Section 12(c)(6) was to give a benefit to a narrow class of state retirees. The record conclusively demonstrates that Mr. Dawson received more favorable tax treatment than state civilian retirees, whose status as retirees affords them no special exemption. Unlike state civilian retirees, federal retirees like Mr. Dawson are allowed to exempt $2,000 from their taxable income. W.Va. Code § 11-21-12(c)(5). Mr. Dawson also received more favorable tax treatment than retired state justices and circuit judges, who likewise are afforded no exemption for their state retirement income.[11] Most importantly, Mr. Dawson received the same tax treatment as the former state employees who make up as the vast majority of all state retirees: recipients of benefits from PERS and the Teachers Retirement System. Additionally only some law enforcement officers (such as deputy sheriffs

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[11] Most retired circuit judges and supreme court justices receive benefits from the Judges' Retirement System and cannot use the exemption applicable to recipients of PERS benefits in W.Va. Code 11-21-12(c)(5). However, family court judges, as well as a handful of former circuit judges and justices, are members of PERS and *can* use the exemption. *See* W.Va. Code § 51-9-5 [1987] (permitting circuit judges and justices to elect PERS coverage); W.Va. Code § 51-2A-6(g) [2011] (providing family court judges are not eligible to participate in the Judges' Retirement System).

receiving benefits from DSRS) are permitted to rely upon the Section 12(c)(6) exemption, while others (such as deputy sheriffs receiving benefits from PERS) are not.

When this Court first upheld Section 12(c)(6) in *Brown* in 1994, the number of retirees who qualified for the exemption comprised four-percent of all state-pension recipients. In the years at issue in this case, the number who qualify for the exemption has diminished to two percent of all state-pension recipients. Similar to what we found in *Brown*, the total structure of West Virginia's system for taxing personal income does not discriminate against retired members of the United States Marshals Service in violation of 4 U.S.C. § 111. Section 12(c)(6) gives a benefit to a very narrow class of former state and local employees, and that benefit was not intended to discriminate against former federal marshals.

The circuit court erred in finding that Section 12(c)(6) was contrary to 4 U.S.C. § 111. Accordingly, the circuit court's March 31, 2016, order must be reversed.

Reversed and remanded.

ISSUED: May 17, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Elizabeth D. Walker

APPENDIX B

16-0441
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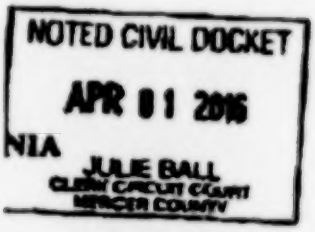


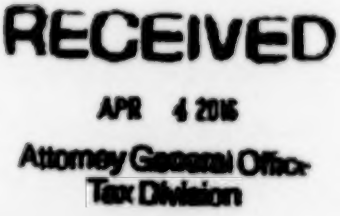
IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

JAMES DAWSON and ELAINE F. DAWSON,
Petitioners,

v.

MARK W. MATKOVICH, as ACTING STATE TAX COMMISSIONER OF WEST VIRGINIA,
Respondent.

CIVIL ACTION NO. 15-C-326



ORDER GRANTING APPEAL AND REVERSING THE DECISION OF THE WEST VIRGINIA OFFICE OF TAX APPEALS

This matter came before the Court for oral argument on March 14, 2016, pursuant to W.Va. Code §11-10A-19, W. Va. CSR §121-1-82, and Rule 2 of the West Virginia Rules for Administrative Appeals. The petitioners appeared in person and by

counsel, David Pogue. The Respondent appeared by counsel, Katherine Schultz.

Background and Procedural History

This matter is an appeal from an Order of the Office of Tax Appeals ("OTA"), which was itself an appeal from a decision by the West Virginia State Tax Department ("Tax Department"). Petitioner James Dawson ("Dawson"), a retired federal law enforcement officer, attempted to exempt his retirement income from state income tax pursuant to W.Va Code §11-21-12(c)(6), but the Tax Department denied the exemption. Dawson and his wife then filed a Petition for Refund before the OTA and a corresponding motion for summary judgment. After conducting a hearing on the matter, the OTA concluded it did not have the power to grant the relief sought. Accordingly OTA denied the Dawsons' motion for summary judgment and dismissed their appeal.

The Dawsons then appealed to this Court pursuant to the Administrative Procedures Act, W.Va Code §29A-5-4(g). On appeal they argue the OTA incorrectly applied the test established in *Brown v. Mierke*, 191 W.Va. 120,443 S.E.2d 462 (1994) instead of the test set forth by the United States Supreme Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). Under the *Davis* standard, W.Va Code §11-21-12(c)(6) violates 4 U.S.C. §111 and the constitutional doctrine of intergovernmental tax immunity by favoring retired state and local law enforcement officers over retired federal law enforcement officers. According to the Dawsons, the OTA also erred by relying on

differences between the pay scales of federal and state law enforcement officers to uphold the validity of §11-21-12(c)(6).

The Tax Department, on the other hand, submits that because Mr. Dawson is a retired US Marshal instead of a retired West Virginia law enforcement official, he does not meet the criteria set forth in §11-21-12(c)(6) and cannot claim the exemption set forth in that statute. The Tax Department further argues that the OTA properly applied *Brown* instead of *Davis*, because the West Virginia Supreme Court rendered its decision in *Brown* after the United States Supreme Court decided *Davis*.

Standard of Review

West Virginia Code §29A-5-4(g) governs this Court's review the administrative decision of the Office of Tax Appeals ("OTA"). W. Va. Code §11-10A-19. Factual findings made by the Tax Department receive deference; Questions of law are reviewed *de novo*. The Court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

(1) in violation of constitutional or statutory provisions; or

(2) in excess of the statutory authority or jurisdiction of the agency; or

(3) made upon unlawful procedures; or

(4) affected by other error of law; or

(5) clearly wrong in view of the reliable, probative ad substantial evidence on the whole record; or

(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va Code §§29A-5-4(g). Guided by this standard, the Court has carefully considered the Memoranda of Law, oral argument, and pertinent legal authorities, and concludes the OTA decision must be reversed.

Analysis

West Virginia Code §11-21-12(c)(6) provides that the following shall be subtracted from a resident individual's adjusted gross income for tax purposes:

> Retirement income received in the form of pensions and annuities after the thirty-first day of December, one thousand nine hundred seventy-nine, under any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System, including any survivorship annuities derived from any of these programs, to the extent includable in gross income for federal income tax purposes.

W.Va. Code §11-21-12(c)(6).

Under the doctrine of intergovernmental tax immunity "[t]he imposition of a heavier tax burden on [those who deal with one sovereign] than is imposed on [those who deal with the other] must be justified by significant differences between the two

classes." *Davis*, 489 U.S. at 815, 816. Thus, a state tax law violates intergovernmental tax immunity if it treats state and local government employees more favorably than similarly situated federal government retirees, unless the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes. *See*, *Id; Barker v. Kansas*, 503 US 594,598 (1992).

Despite this clear precedent established by United States Supreme Court, the OTA instead applied *Brown v. Mierke*, 443 S.E.2d 462 (W.Va. 1994), claiming this West Virginia Supreme Court decision governs all claims of intergovernmental tax immunity in West Virginia. *Brown*, however, involved the determination of whether military retirees – a federal occupation which did not have a state counterpart identified in §11-21-12(c)(6) – were entitled to the state tax exemption. The fact that "the retirees failed to demonstrate that their job descriptions during any substantial part of their active service corresponded to the job descriptions of municipal firefights, municipal police officers, or state police officers" was a pivotal fact upon which our Court distinguished *Brown* from *Davis*. See, *Brown*, 443 S.E.2d 465.

The *Brown* Court further concluded that when a court is determining if discrimination exists, it is to look to the totality of the circumstances to ascertain whether the intent of the scheme was to discriminate against employees or former employees of the federal government as opposed to merely favoring state employees. Syl. Pt. 2, *Brown*, 443 S.E.2d at 465. Then, despite there being no such hurdle imposed by *Davis* and its progeny, the *Brown* Court deemed

§11-21-12(c)(6) non-violative of the intergovernmental tax immunity doctrine as applied to military retirees. *Brown* does not apply to the case at bar.

To begin, it is axiomatic that state courts are bound by the decisions of the United States Supreme Court. And the United States Supreme Court has held, in no uncertain terms, that when a state tax statute is alleged to violate the constitutional doctrine of intergovernmental tax immunity by favoring state employees over similarly situated federal employees, the proper inquiry is whether the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes. *See*, *Davis*, 489 U.S. at 816; *Barker*, 503 U.S. at 598. It is undisputed in the present matter that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers listed in §11-21-12(c)(6). Thus, unlike the military retirees in *Brown* who "failed to demonstrate that their job descriptions during any substantial part of their active service corresponded to the job descriptions of municipal firefighters, municipal police officers or state police officers..."[1] the job responsibilities of a US Marshall *are* substantially similar to the job responsibilities of state law enforcement officers. It is these pivotal similarities between the duties of state and federal law enforcement counterparts that bring this matter squarely within the purview of *Davis*.

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[1] *Brown*, 442 S.E.2d at 465.

Furthermore, the outcome in *Brown* may have been correct under the specific facts of that case, because §11-21-12(c)(6) only applies to law enforcement officers and firefighters, neither of which the *Brown* petitioners were. Hence, the reason they did not receive the exemption was because they were not law enforcement officers or firefighters. Mr. Dawson, however, *is*, but since he is a retired *federal* law enforcement officer rather than a retired *state* or *local* law enforcement officer who could receive social security benefits,[2] the OTA denied him the §11-21-12(c)(6) exemption.

During oral argument the respondent justified its decision, explaining that the Legislature crafted §11-21-12(c)(6) specifically to benefit the narrow class of *state* law enforcement officers. This type of inconsistent tax treatment is, however, unquestionably based on the source of one's retirement income and precisely the type of favoritism the doctrine of intergovernmental tax immunity prohibits. *See, Davis, supra.*

To the extent the OTA concluded that §11-21-12(c)(6) is constitutional based on the income differential between state and local law enforcement

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[2] Since the non-precedential decision of the Monongalia Circuit Court in *Dodson v. Palmer*, C.A. No. 00-C-AP-10 (2000) the OTA has only denied the exemption in §11-21-12(c)(6) to those federal law enforcement officers who are eligible to collect social security benefits, and has done so based solely on the false belief that the state and local law enforcement officers listed in §11-21-12(c)(6) are not eligible to collect social security benefits. In the pending matter, the OTA erroneously based its decision on the fact Mr. Dawson had paid into social security and could receive social security.

officers and their federal counterparts, this, too, was in error. The United States Supreme Court rejected this very notion in *Davis*, reasoning that

> [w]hile the average retired federal civil servant receives a larger pension than his state counterpart, there are undoubtedly many individual instances in which the opposite holds true. A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits...rather, it would discriminate on the basis of the amount of benefits received by individual retires.

Davis, at 817. Had the West Virginia's Legislature intended 11-21-12(c)(6) to account for differences in income instead of differences in the source of income, it easily could have do so.

It is for these reasons, the Court concludes the underlying decision was affected by error of law, and the OTA's final decision violated the constitutional doctrine of intergovernmental tax immunity.

Ruling

1. The OTA erred in concluding that the West Virginia Supreme Court's decision in *Brown* rather than the United States Supreme Court's decision in *Davis* and its progeny control the outcome of this case.
2. West Virginia Code §11-21-12(c)(6), as applied in the case at bar, violates 4 U.S.C. §111 and the doctrine of intergovernmental tax immunity by favoring retired state and local law enforcement officers over retired federal law enforcement officers.

3. The OTA further erred to the extent it relied on differences between the pay scales of federal and state law enforcement officers to uphold the validity of §11-21-12(c)(6), and *Dodson v. Palmer*, C.A. No. 00-C-AP-10 (2000) to justify its exclusion of Mr. Dawson from exemption.
4. The OTA's decision is hereby **REVERSED**.
5. The circuit clerk shall provide a copy of this Order to counsel of record and remove the case from the docket.

ENTERED the 31 day of March 2016.

/s/ William J. Sadler
William J. Sadler, Judge 9th Circuit

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ENTERED the 31 day of March 2016.

/s/ William J. Sadler
William J. Sadler, Judge 9th Circuit

No. 17-419

In the Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER, AS STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), this Court applied the intergovernmental tax immunity doctrine—which is coextensive with 4 U.S.C. § 111(a)—to strike down a state law that exempted from taxable income the retirement income of all of Michigan's state employees, but not of federal government employees. This Court concluded that the law discriminated against federal retirees on the basis of their source of income, and was not "justified by significant differences between the two classes" of taxpayers. *Davis*, 489 U.S. at 815–16. Since *Davis*, five state courts of last resort have applied this fact-specific standard to aspects of their state tax regimes. Three of these courts struck down statutes that extended tax exemptions to all of a State's public retirees, while taxing fully the income of all or a subset of federal retirees. The other two courts rejected challenges to state tax laws that exempt the retirement income of a narrow class of state retirees only.

The question presented is:

Whether the doctrine of intergovernmental tax immunity requires a State to extend a tax exemption available to a narrow class of state retirees to federal retirees with job descriptions similar to some of the workers to whom the exemption applies, where federal retirees are treated as or more favorably than the vast majority of state-government retirees.

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OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals is unpublished, but has been informally reported at 2017 WL 2172006. The opinion is reproduced in Petitioners' Appendix at Pet. App. 1a.

The order of the Circuit Court of Mercer County is reproduced in Petitioners' Appendix at Pet. App. 17a. This order is not published formally or informally.

STATEMENT OF THE CASE

In the decision below, the West Virginia Supreme Court of Appeals held that a limited state-tax exemption applicable to less than 2% of West Virginia government retirees did not impermissibly discriminate against federal retirees with job descriptions similar to some of the workers to whom the tax exemption applies. Under 4 U.S.C. § 111(a) and this Court's intergovernmental tax immunity precedents, the court concluded that the tax scheme did not discriminate based on the source of retirees' income—as opposed to other cases in which States had granted blanket exemptions for their entire retired workforces, but not federal retirees. Here, because the exemption applies to so few state retirees and the State treats federal retirees the same as—or better than—the overwhelming number of state

retirees, there is no statutory or constitutional defect in the West Virginia law.

This Court's review is unnecessary because the decision below is consistent with all other state courts of last resort that have analyzed similar tax exemptions for all or part of a State's employees. The Petition provides no example where a court has invalidated a narrow tax exemption like West Virginia's. Instead, Petitioners point to decisions in which courts struck down blanket tax exemptions for state employees, and decisions in which courts (as below) have upheld much more limited exemption regimes. These decisions illustrate different *outcomes* under different facts, not different *legal principles* or disagreement about how this Court's precedents should be applied.

Further, the decision below is correct. The primary case on which Petitioners rely, *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803 (1989), invalidated a blanket tax exemption for state employees, but did not suggest that the same result would hold for a limited, more tailored exemption scheme. To the contrary, ten years after *Davis* this Court upheld such a tailored state tax regime. *Jefferson Cty., Ala. v. Acker*, 527 U.S. 423 (1999). The decision below is fully consistent

with this Court's precedents and the doctrine of intergovernmental tax immunity.

Furthermore, the decision below is a poor candidate for review. The court below did not reach the fact-specific issue of whether significant differences between the relevant state and federal retirees might justify different tax treatment, which means that the outcome of the case may not change even if this Court were to grant certiorari and rule for Petitioners. There is also every reason to believe that review could unsettle decades of resolved state-law precedent on the scope of the intergovernmental tax immunity doctrine, which could create uncertainty for current and future government retirees alike as States readjust their tax regimes in response to this Court's decision. Especially where there is no evidence that States are treating federal workers unfairly in comparison to their own employees now—or that state courts are incapable of striking down any laws that might—there is no reason for this Court to intervene.

1. In *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (1819), this Court held that a discriminatory state tax on the Bank of the United States improperly interfered with the federal government's constitutional powers, and thus violated the doctrine of intergovernmental tax immunity. Grounded in the "need to protect each sovereign's

governmental operations from undue interference by the other," *Davis*, 489 U.S. at 814, over time this doctrine became "expansively applied" beyond the context of government instrumentalities, to taxes on the salaries of federal and state employees as well, *Jefferson Cty.*, 527 U.S. at 436. In that context, "salaries of most government employees, both state and federal, generally were thought to be exempt from taxation," because to allow "any tax on income a party received under a contract with the government was a tax 'on' the government" in the sense that "it burdened the government's power to enter into the contract." *Davis*, 489 U.S. at 811 (citation omitted).

In the Public Salary Tax Act of 1939, however, Congress both made state and local employees subject to federal income tax, and "expressly waived whatever immunity would have otherwise shielded federal employees from nondiscriminatory state taxes." *Davis*, 489 U.S. at 812. This waiver of immunity is limited by Section 111 of the statute, which provides that "[t]he United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States" *only if* "the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. § 111(a) ("Section 111"). This Court has held that Section 111 is "coextensive with the prohibition against discriminatory taxes embodied in the modern

constitutional doctrine of intergovernmental tax immunity." *Davis*, 489 U.S. at 813.[1]

This Court revisited the intergovernmental tax immunity doctrine's scope in its 1989 decision in *Davis v. Michigan Department of Treasury*. Applying Section 111, *Davis* invalidated a Michigan tax scheme in which retirement benefits received by all state retirees were eligible for a blanket exemption from taxation, but retirement benefits received by federal retirees were not. 489 U.S. at 806. The Court held that this regime was overt discrimination "because of the source of" retirees' pay, and the distinction between federal and state employees was not "justified by significant differences between the two classes" of employees. *Id.* at 815 (quoting 4 U.S.C. § 111(a), *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)).

In *Jefferson County v. Acker*, however, the Court rejected an interpretation of Section 111 that "extend[ed] the doctrine [of intergovernmental tax immunity] beyond the tight limits this Court has set." 527 U.S. 423, 436 (1999). There, Jefferson County, Alabama, imposed a licensing tax on state and federal judges, but exempted taxpayers who held a license under other state or county laws. *Ibid.* Two federal

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[1] In light of this holding, this brief, like the Petition (at 8 n.2), will at times refer to Section 111 and the intergovernmental tax immunity doctrine interchangeably.

judges argued that the tax discriminated against federal taxpayers because, as a practical matter, only state and local judges would ever be eligible for the exemption—but this Court rejected their challenge. *Id.* at 443. Instead, the Court reemphasized its "narrow approach to intergovernmental tax immunity," *id.* at 437 (citation omitted), and found no discrimination "between similarly situated federal and state employees," *id.* at 443.

2. West Virginia taxes the retirement income of most local, state, and federal employees, with certain exemptions. Any taxpayer 65 or over may exempt up to $8,000 from their taxable income. Pet. App. 3a; W. Va. Code § 11-21-12(c)(8). For retirees under 65, those receiving income from the West Virginia Public Employees Retirement System ("PERS") and the State Teachers Retirement System—as well as all federal retirees—are entitled to exempt up to $2,000 of their retirement benefits from their taxable income. Pet. App. 2a–3a; W. Va. Code § 11-21-12(c)(5). Military retirement benefits are exempt up to $20,000. Pet. App. 3a; W. Va. Code § 11-21-12(c)(7)(B).

As an exception to this general scheme, West Virginia's tax code also allows a small number of state government retirees to exempt from their taxable income all benefits received from four discrete retirement plans. These plans are the Municipal

Police Officer and Firefighter Retirement System; the Deputy Sheriff Retirement System; the State Police Death, Disability and Retirement Fund (which compensates retired West Virginia State Troopers); and the West Virginia State Police Retirement System. W. Va. Code § 11-21-12(c)(6) ("Section 12(c)(6)").

The West Virginia Legislature's intent in creating the Section 12(c)(6) exception was "to give a benefit to a very narrow class of former state and local employees." *Brown v. Mierke*, 191 W. Va. 120, 124, 443 S.E.2d 462, 466 (1994), *cert. denied sub nom. Brown v. Paige*, 513 U.S. 877 (1994). The facts bear out this goal: Less than two percent of all state government retirees are eligible for the exemption. Pet. App. 13a. Further, not all state retirees who may appear to qualify for the exemption based on their job description and the name of one of the enumerated retirement plans are, in fact, eligible. Some retired deputy sheriffs receive retirement benefits from the more general PERS system instead of the Deputy Sheriff Retirement System, for example, and thus—like the vast majority of retired state employees—are eligible for only the standard $2,000 exemption. *Ibid.* The exemption is also not available for law enforcement officers employed by the West Virginia

Department of Natural Resources or the State Capitol Police. Pet. App. 13a–14a.

3. In 2008, Petitioner James Dawson retired from the U.S. Marshals Service. Pet. App. 4a. As a federal employee, Mr. Dawson was never enrolled in one of the four retirement programs enumerated in Section 12(c)(6); rather, he receives benefits under the Federal Employee Retirement System. Pet. App. 4a. It is undisputed that Mr. Dawson is eligible to exempt at least $2,000 from this retirement income under the general West Virginia government retirement income provision, and will be entitled to exempt up to $8,000 after he turns 65. *Ibid.*

In 2013, Mr. Dawson and his wife, Petitioner Elaine Dawson, filed amended tax returns claiming a full exemption under Section 12(c)(6) for tax years 2010 and 2011. Pet. App. 4a. The West Virginia State Tax Department denied the claimed exemption, and the Dawsons appealed the denial to the West Virginia Office of Tax Appeals. Pet. App. 4a–5a. The Dawsons argued that there are no significant differences between state and federal law enforcement officers, and thus to deny Mr. Dawson eligibility for an exemption that applies to some (but not all) state law enforcement offers would constitute unlawful discrimination based on source of income under Section 111. *Ibid.* The Office of Tax Appeals affirmed

the denial of the Section 12(c)(6) exemption. Pet. App. 5a.

The Dawsons then appealed to the Circuit Court of Mercer County, which reversed the decision of the Office of Tax Appeals. Pet. App. 5a. The Circuit Court determined that there were no substantial differences between the job responsibilities of a U.S. Marshal and those of state law enforcement officers, and thus, under *Davis*, denying the Section 12(c)(6) exemption to U.S. Marshals violated Section 111 and the doctrine of intergovernmental tax immunity. Pet. App. 22a, 24a.

4. On May 17, 2017, by memorandum decision, the West Virginia Supreme Court of Appeals reversed the Circuit Court. Pet. App. 16a.

Relying on *Brown v. Mierke*, a 1994 West Virginia Supreme Court of Appeals case that had applied *Davis* to the same state retirement tax provisions at issue here, the court held that there is "no intent in the West Virginia scheme to discriminate *against* federal retirees; rather, the intent is to give a benefit to a very narrow class of former state and local employees." Pet. App. 10a (quoting *Brown*, 191 W. Va. at 124, 443 S.E.2d at 466) (emphasis in original). In *Brown*, the court had held that "West Virginia's limited, multi-tiered series of tax exemptions differed from" regimes this Court has invalidated under Section 111, and thus that there was no intent to

discriminate on the basis of a retiree's source of income, as Section 111 prohibits. 191 W. Va. at 121, 443 S.E.2d at 463.

The same factors guided the court's reasoning below. Under the "narrow" eligibility requirements in Section 12(c)(6), "only *some* [state] law enforcement officers" can claim the exemption—not all. Pet. App. 15a–16a (emphasis added). The Dawsons also received more favorable tax treatment than non-government retirees, "whose status as retirees affords them no special exemption," and more favorable tax treatment than even some *state* government retirees, including "state justices and circuit judges." Pet. App. 15a. And, "[m]ost importantly," the Dawsons received the same tax treatment as "the vast majority of all state retirees" in West Virginia. *Ibid.* Thus, "[i]n light of the totality of the circumstances, and the totality of the structure of West Virginia's tax and retirement scheme, Section 12(c)(6) did not discriminate against Mr. Dawson." *Ibid.*

REASONS FOR DENYING THE PETITION

I. Courts Nationwide Consistently And Correctly Apply The Intergovernmental Tax Immunity Doctrine To State Tax Laws Regulating Government Retirement Income.

Petitioners argue that this Court should intervene to resolve "division among state courts of last resort" over whether States may "exempt[] groups of state

retirees from taxation" without also extending the exemption to "similarly-situated federal retirees." Pet. 7–8. No such division exists. Petitioners identify no case in any court striking down a tax scheme that offers narrow exemptions for some state retirees, yet treats federal retirees the same as (or better than) the overwhelming majority of state retirees.

In reality, there is no confusion in the courts over proper application of the intergovernmental tax immunity doctrine. The division Petitioners allege is illustrated by the different outcomes courts have reached when applying this Court's precedents to the fact-specific contexts of various state tax codes. For the three cases on one side of the purported split in authority, the courts resolved challenges to laws that offered blanket tax exemptions to state retirees, but not federal retirees. Unsurprisingly, given the similarity of these laws to the Michigan statute this Court considered in *Davis*, the courts invalidated each law. On the other side of Petitioners' division, two state courts of last resort and one intermediate state appellate court faced materially different state laws: Narrow exemptions that applied to vanishingly small numbers of state retirees, not preferential treatment for state retirees as a whole. Because nothing in *Davis* or this Court's precedents supports Petitioners' theory that these laws violate the intergovernmental tax immunity doctrine, these decisions are both correct

and fully consistent with each other and the other cases on which Petitioners rely.

A. The decision below is consistent with the decisions of state courts of last resort striking down blanket tax exemptions for state retirees.

Petitioners identify decisions from three state courts of last resort that—like *Davis*—invalidated state laws that exempted the retirement benefits of all state employees, but not federal retirees' benefits. Both the holdings and reasoning of these decisions are consistent with the decision below.

Arkansas. In *Pledger v. Bosnick*, the Supreme Court of Arkansas struck down a tax scheme that allowed "retired employees of the State of Arkansas and local government employees" a full exemption for retirement income, yet capped the exemption for retirement income of other employees at $6,000. 306 Ark. 45, 47, 811 S.W.2d 286, 288 (1991), *abrogated on other grounds by State, Dep't of Fin. & Admin. v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996). There, a certified class of federal military and civil service retirees, as well as retirees from the agencies of other States and political subdivisions, had challenged Arkansas's tax regime under Section 111 and the intergovernmental tax immunity doctrine. 306 Ark. at 47, 811 S.W.2d at 288. The Arkansas Supreme Court agreed, relying on *Davis* for its holding that "the

tax discriminates based upon the source of the payment, since the source of one payment is the State of Arkansas and the source of the military pay is the federal government, and the source of the pay to a retiree from the civil service of another state is that other state's government." *Id.* at 53–54, 811 S.W.2d at 292.

There is no tension between the decision below and the Arkansas Supreme Court's straightforward application of *Davis* to a state tax regime that gave blanket preferential treatment to all state retirees.

The "crux" of the court's analysis in *Pledger* was whether the Arkansas tax scheme distinguished taxpayers based on the *source* of their compensation—which Section 111 prohibits—or the *nature* of the compensation—which it does not. 306 Ark. at 53, 811 S.W.2d at 291. Accordingly, much of the court's analysis focused on whether the federal retirees' income was analogous to the pension state retirees received, or rather was "reduced pay for reduced service." *Ibid.* Once the court determined that the pay was best classified as pension income, it readily found that the tax regime discriminated based on source of income, and thus was invalid under *Davis*. *Ibid.*

Petitioners argue (at 12) that the Arkansas Supreme Court's failure to say anything "about *Davis* being applicable only to challenges of blanket tax

exemptions" suggests a different view of this Court's precedent than in the decision below. Yet because the key issue in *Pledger* was the nature of the distinction between taxpayers, this "omission" is unsurprising. Once that question was resolved, the case fit squarely within *Davis*'s rubric for blanket tax exemptions applicable to state retirees only. There was no need for the court to opine on the merits of a different, hypothetical law. *Pledger* thus neither held nor suggested that the court would reach the same result in a case involving a law—like West Virginia's—that treats federal retirees the same as the vast majority of state retirees.

Colorado. Similarly, in *Kuhn v. State Department of Revenue*, the Supreme Court of Colorado invalidated a tax scheme that allowed a $20,000 exemption on retirement benefits for all state and private retirees and federal nonmilitary retirees under the age of 55, but only a $2,000 exemption for federal military retirees, regardless of age. 817 P.2d 101, 103 (Colo. 1991) (en banc).

As in *Pledger*, the critical issue in *Kuhn* was whether military retirement benefits are *different in kind* from other sources of retirement income. 817 P.2d at 108 (rejecting State Department of Revenue's argument that military retirement benefits are "current compensation for responsibilities accrued after retirement"). Also as in *Pledger*, the Supreme

Court of Colorado concluded that military retirement pay "must be viewed realistically as compensation for past, not present services," and thus "is a pension." *Ibid.*

Having concluded that military retirement pay is equivalent to non-military retirement benefits for purposes of intergovernmental tax immunity analysis, the court in *Kuhn*—again—reached the same result as in *Pledger*: the state tax code "discriminate[d] between taxpayers based on the source of their income." *Ibid.* And because the "state has failed to show significant differences that would justify the discriminatory tax scheme," the court held that it "was unconstitutional under the doctrine of intergovernmental tax immunity and violated [Section] 111." *Id.* at 109.

Petitioners again rely on the fact that *Kuhn* "said nothing to indicate that the holding in *Davis* is limited to blanket tax exemptions" as purported evidence of division between this case and the decision below. Pet. 13. Yet in a case involving a blanket tax exemption for all state retirees and where much of the analysis focused on whether the tax discriminated based on source of income, there is nothing remarkable about the Colorado Supreme Court's

failure to speculate about how this Court's precedent might be applied in a *different* case.

Missouri. Finally, in *Hackman v. Director of Revenue*, the Supreme Court of Missouri struck down a tax scheme that exempted the retirement benefits of state employees without extending the same exemption to federal retirees. 771 S.W.2d 77, 79–80 (Mo. 1989). Unlike the Michigan law at issue in *Davis* (and the laws in *Pledger* and *Kuhn*), where one provision of the tax code exempted the retirement benefits of all state employees, the Missouri "legislature provide[d] the income tax exemptions in the statutes that create the various retirement systems" applicable to state employees. *Id.* at 79. Petitioners characterize this choice to place individual exemptions throughout the tax code (rather than enacting a single blanket exemption) as a scheme of "narrow" exemptions, Pet. 14—which purportedly places *Hackman*'s holding invalidating that scheme at odds with the decision below.

The similarity is illusory: *Hackman* emphasized that "[t]he effect of Missouri's scattered retirement benefit exemption statutes *is identical to that of Michigan's statute* for purposes of a *Davis* analysis." 771 S.W.2d at 80 (emphasis added). In other words, the Missouri Supreme Court recognized that the *form* a discriminatory tax regime takes is irrelevant where the *effect* is to provide more favorable treatment for a

State's employees than their federal counterparts. Because Missouri's tax code offered, in practice, the same type of blanket exemption for state retirees that this Court struck down in *Davis*—nothing like the system of isolated exemptions applicable to less than 2% of state retirees at issue here—there is no conflict between *Hackman* and the decision below.[2]

In short, *Pledger*, *Kuhn*, and *Hackman* do not "conflict[] with the decision[s] of [other] state court[s] of last resort." Sup. Ct. R. 10(b). In each case, the court was simply faced with a tax regime markedly similar to the blanket exemption for state retirees at issue in *Davis*, and applied this Court's precedent accordingly. None, as here, involved a state tax regime in which only a small number of state retirees are eligible for an additional exemption, but federal retirees receive the same (or better) tax treatment as the lion's share of state retirees. Without confronting or deciding the question—or even, for that matter, addressing it in dicta—there are *no* courts on the other side of the "division" that Petitioners claim the decision below "exacerbates." Pet. 7.

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[2] Petitioners' reliance on *Hackman* is further misplaced because the court found Missouri's tax regime to be even *less* favorable to federal retirees than the statute *Davis* struck down, which (like West Virginia's tax code, Pet. App. 2a–3a), allowed a partial exemption for federal retirement benefits. 771 S.W.2d at 80.

B. The decision below is consistent with previous state court decisions that correctly applied this Court's precedent to uphold tax exemptions for subsets of state employees.

In contrast to the three cases discussed above, Petitioners argue that the lower court's decision incorrectly applies this Court's intergovernmental tax immunity precedents, and thus joins similar decisions from another state court of last resort and an intermediate state appellate court on the other side of Petitioners' purported "split" in state-court authority. In ruling against the federal taxpayers, however, these decisions apply the same legal principles and reasoning as the courts that—on different facts—ruled in their favor.

West Virginia. Petitioners' first example of a decision on the other side of the (nonexistent) division among state courts is also from the West Virginia Supreme Court of Appeals: the 1994 *Brown v. Mierke* decision on which the decision below relies. In *Brown*, the court upheld the same discrete set of exemptions for certain state retirees at issue here, finding that West Virginia's scheme did not violate the doctrine of intergovernmental tax immunity, as interpreted by *Davis*. *Brown*, 191 W. Va. at 121, 443 S.E.2d at 463.

Far from lacking "legal support" and "ignor[ing] *Davis*," Pet. 16–17, *Brown* considered the principles

animating the doctrine of intergovernmental tax immunity in this Court's precedents, and weighed them against a careful comparison of West Virginia's statutes and the Michigan scheme at issue in *Davis*. *Brown*, 191 W. Va. at 121–24, 443 S.E.2d at 463–66. Unlike Michigan's system—or the Arkansas, Colorado, or Missouri laws discussed above—West Virginia (at that time) exempted "less than four percent of all State government retirees in West Virginia." *Id.* at 123, 443 S.E.2d at 465. Federal retirees received the same treatment as most of the other 96% of state retirees. *Ibid.* Additionally, federal retirees received more favorable treatment than West Virginia residents retired from civilian jobs, and "*substantially more favorable*" treatment than even some state retirees. *Id.* at 125, 443 S.E.2d at 467 (emphasis added). In light of these critical distinctions, the court found "no intent in the West Virginia scheme to discriminate against federal retirees." *Id.* at 124, S.E.2d at 466. Instead, its intent was "to give a benefit to a very narrow class of former state and local employees." *Ibid.*

In short, *Brown*'s result differs from the outcomes in *Pledger*, *Kuhn*, and *Hackman* not because the West Virginia Supreme Court of Appeals applied a different

understanding of *Davis*, but because *Davis* dictated a different result when applied to a vastly different law.

To be sure, neither *Brown* nor the decision below turned on a finding that discriminatory tax treatment was "justified by significant differences between the two classes of employees." *Davis*, 489 U.S. at 815. But there is no tension with the decisions of other courts on this score, either. The "significant difference" test is a defense that States can use to salvage a tax that would otherwise be struck down as discriminating "because of the source of the pay or compensation." 4 U.S.C. § 111(a); see also *Davis*, 489 U.S. at 815. Indeed, the Colorado Supreme Court in *Kuhn* proceeded to the "significant difference" test only *after* it determined that the tax regime discriminated "based on the source of [taxpayers'] income." 817 P.2d at 108–09. Where, as in *Brown* and the decision below, a tax regime does not impermissibly discriminate against federal employees in the first place, it is irrelevant whether significant differences could justify a different law that would.

New Mexico. Petitioners' reliance on *Alarid v. Secretary of New Mexico Department of Taxation & Revenue*, 878 P.2d 341 (N.M. Ct. App. 1994), falls flat for the simple reason that it is a decision of the Court

of Appeals of New Mexico, not the New Mexico Supreme Court.

In any event, there is no conflict between this intermediate state appellate court decision and decisions from state courts of last resort. The parties in *Alarid* stipulated that the taxable income in question came from the State of California, not the federal government, which meant that Section 111—and "the cornerstone of *Davis*"—did not apply. 878 P.2d at 345; see also *ibid.* (holding that although the "cost" of the retirement benefits was ultimately passed onto the federal government by contract, this fact was "irrelevant because the 'legal incidence' of the tax does not fall upon the federal government or its instrumentalities" (quoting *United States v. Cty. of Fresno*, 429 U.S. 452, 459 (1977))). As a result, the court's holding turned largely on this Court's separate precedent regarding the legality of taxes that affect "an entity doing business with the federal government." *Id.* at 346 (citing *United States v. New Mexico*, 455 U.S. 720 (1982)).

Concluding that the alleged "discriminatory impact" of New Mexico's tax regime was "not directed toward the federal government" and thus "not prohibited," *Alarid*, 878 P.2d at 346, the court's analysis of the intergovernmental tax immunity doctrine was brief—and dicta. Even then, there is no conflict with other courts' application of *Davis*. The

New Mexico regime applied to "one limited class of state retirees" only, and plaintiffs were treated "no different than the vast majority of other New Mexico citizens whose retirement incomes are also subject to New Mexico income tax." *Id.* at 347.

Massachusetts. Finally, the Massachusetts Supreme Judicial Court's decision in *Cooper v. Commissioner of Revenue*, 421 Mass. 557, 658 N.E.2d 963 (1995), conflicts with neither this Court nor any state court of highest resort.

In *Cooper*, the court rejected a challenge to a "grandfather" provision in the Massachusetts tax code that exempted certain retirement income to municipal police and firefighters who were employed before 1938. 421 Mass. at 561, 658 N.E.2d at 965. As an initial matter, the court found no discrimination on the basis of "source of the pay or compensation," as Section 111 prohibits, but rather "on the basis of occupation" and "date of first employment." *Ibid.* This holding was enough to uphold the tax against challenge under the intergovernmental tax immunity doctrine.

The court's discussion of the *size* of the exempted class of state employees was thus unnecessary to its holding. It was also consistent with governing precedent. The court emphasized that the exemption applied to only "a small and dwindling class" of state retirees, and as such did "not think it can be credibly

argued that it constitutes discrimination against federally funded benefits." *Ibid.* (citation omitted).

Finally, the court found no need to consider whether "alleged inconsistencies" between classes of employees satisfy *Davis*'s "significant differences" standard, because it had already concluded that the statute did not discriminate "because of the source of the pay or compensation." *Id.* at 966 n.5. This approach tracks the logic of *Brown*, *Kuhn*, and the decision below, which all make clear that the significant difference test is relevant only after the court finds a state tax regime discriminates based on the source of taxpayers' compensation.

C. Review would not resolve purported confusion over application of the intergovernmental tax immunity doctrine to issues not raised below.

Perhaps recognizing the difficulty of manufacturing division among state courts over *Davis*'s application to tax codes that exempt small subsets of state retirees, Petitioners also rely on purported state-court divisions over *entirely different* aspects of the doctrine of intergovernmental tax immunity. Pet. 21–25. Specifically, Petitioners object to state tax schemes that "allow tax exemptions or deductions for only specific types of contributions made to retirement plans," *id.* at 21, as well as decisions to increase "state employee retirement

benefits" in some States after tax exemptions for state retirees have been repealed, *id.* at 23.

Whatever merit there may be to Petitioners' concern that these state laws may be "attempts to circumvent *Davis*," Pet. 24, none of those laws is at issue here. Nor, for that matter, is it likely that a decision on whether States can grant tax exemptions to subsets of state employees would provide direction on the extent (if any) to which other, more indirect state laws and policies—including some outside the context of state tax law altogether—may implicate intergovernmental tax immunity doctrine concerns. Because the Court is not in the business of issuing advisory opinions, granting review would thus have no effect on these independent issues.

Indeed, if Petitioners are correct that "state courts are having difficulty applying *Davis* and its progeny" because of new laws that may indirectly increase federal employees' tax burdens as compared to state employees', Pet. 25, that would be an additional reason to deny the Petition. Review in *this* case—which involves none of the laws Petitioners describe, and where the legal implications of such regimes were neither pressed nor passed on below—would do nothing to clarify *Davis*'s "parameter and scope" in those separate contexts. Pet. 25. If anything, the

Court should reserve its powder for an appropriate case where these issues are squarely presented.

II. The Decision Below Correctly Applied The Intergovernmental Tax Immunity Doctrine And This Court's Precedent.

This Court should deny review not only because there is no division among the lower courts that have resolved intergovernmental tax immunity challenges to state tax exemptions for government retirees, but also because the decision below is correct.

First, the West Virginia Supreme Court of Appeals correctly held that the doctrine of intergovernmental tax immunity is not offended where a State's tax laws treat federal employees just as favorably as—or better than—the vast majority of the State's own employees.

Petitioners argue that the court below "chose to disregard" *Davis*'s "broad[]" holding "that taxes favoring retired state and local governmental employees over similarly situated retired federal employees violate the doctrine of intergovernmental tax immunity." Pet. 25, 27. But *Davis*'s holding was "broad" only in the sense that it invalidated Michigan's exemption for *all* state employees at the expense of *all* federal employees. 489 U.S. at 806, 815. It did not hold that *every* exemption for state employees—no matter how narrow—is impermissible discrimination on the basis of pay unless the State

extends a corresponding exemption to federal employees with similar job descriptions.

Nevertheless, Petitioners claim that there is no "supporting authority" for a rule that narrow exemptions do not necessarily violate the intergovernmental tax immunity doctrine. Pet. 27. But this Court held precisely that in *Jefferson County*, which upheld a tax exemption that the county made available to *some* state and local judges, but *no* federal judges. 527 U.S. at 443. Petitioners elide this holding and seize instead on dicta, Pet. 27, in which the Court cautioned that it would "present a starkly different case" if the State were to "take to exempting state officials while leaving federal officials (or a subcategory of them) subject to the tax." *Jefferson Cty.*, 527 U.S. at 443. This language, however, simply means that States cannot evade the logic of *Davis* by adopting a blanket exemption for all state retirees, and bringing a select few federal employees along for the ride. Neither *Davis* nor *Jefferson County* suggests that treating federal employees the same as the vast majority of state employees is discrimination based on source of pay. See *Cooper*, 421 Mass. at 562, 658 N.E.2d at 966 (rejecting argument that "amounts to a request that Federal employees be treated better than State and local employees").

This conclusion is underscored by another aspect of *Jefferson County* that Petitioners ignore: the

Court's repeated refusal to "extend the doctrine [of intergovernmental tax immunity] beyond the tight limits this Court has set." 527 U.S. at 436; see also *id.* at 437 (emphasizing the Court's "narrow approach to intergovernmental tax immunity" (citation omitted)). Far from violating *Davis*, the court below (like the Massachusetts Supreme Judicial Court and New Mexico Court of Appeals) followed *all* of this Court's teachings about the scope of the intergovernmental tax immunity doctrine—including the admonition not to stretch it "beyond the tight limits this Court has set."

Finally, although there may be some difficult cases at the margins, this is not that case. Twenty-three years ago, this Court denied certiorari review in *Brown*, see *Brown v. Paige*, 513 U.S. 877 (1994)—which was a decision out of the same court, analyzing the same tax provisions, and reaching the same result as the decision below.[3] Then, the tax regime applied to 4% of the West Virginia's state government retirees. *Brown*, 191 W. Va. at 123, 443 S.E.2d at 465. Now, the same laws reach less than 2%. Pet. App. 16a. *Brown* was correctly decided in 1994, and now

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[3] Tellingly, Petitioners identify no state courts of last resort to part ways with *Brown*'s analysis since this Court denied review. The Arkansas, Colorado, and Missouri cases discussed above that Petitioners argue conflict with *Brown* were all decided before *Brown*. Petitioners have identified no cases critiquing its analysis—much less reaching the opposite result—since.

that the number of state retirees receiving "preferential" treatment has *decreased*, the rationale for upholding West Virginia's limited tax exemption regime is stronger still.

Second, the court below did not err in "avoiding the question whether significant differences could justify" the challenged tax provisions. Pet. 28. *Davis*'s significant difference standard is a means by which a state tax law may withstand scrutiny *even if* it discriminates based on source of pay; it is not itself necessary in determining whether such discrimination has occurred. Indeed, in *Davis*, it was "undisputed that Michigan's tax scheme discriminates in favor of retired state employees and against federal employees." 489 U.S. at 814. Only *after* finding discrimination existed did the Court consider whether it could nonetheless be "justified by significant differences between the two classes." *Id.* at 815–16.

Likewise, *Jefferson County* did not apply the significant difference test, because it determined that "[t]he record shows no discrimination . . . between similarly situated federal and state employees." 527 U.S. at 443 (citation omitted). The court below did not

"violate" *Davis* by following this Court's example in *Jefferson County*.

III. Review Would Cause Unnecessary Litigation And Increased Uncertainty For State And Federal Retirees.

Petitioners argue that this case is an ideal vehicle to resolve a recurring and important question facing courts nationwide. Pet. 29–33. In reality, revisiting this Court's intergovernmental tax immunity precedent would needlessly unsettle decisions of courts across the country that have already resolved these issues consistent with Section 111 and the Constitution.

First, this is the wrong case to resolve any hypothetical uncertainty on the edges of the intergovernmental tax immunity doctrine. For one thing, it is not "undisputed that there are no significant differences" between Mr. Dawson and the state retirees to whom the tax exemptions at issue apply. Pet. 32. The state trial court (but not the Supreme Court of Appeals) found substantial similarities between Mr. Dawson's job description and some of the state and local law enforcement officers who qualify for the West Virginia exemption, Pet. App. 22a, but the Tax Commissioner argued below that there are also other relevant differences that would justify the tax treatment accorded. See Pet'rs Br. of the W. Va. State Tax Comm'r, *Matkovich v.*

Dawson, No. 16-0441, at 20–23 (W. Va. Aug. 2, 2016). Thus, even if this Court were to grant review and hold that the West Virginia regime discriminates on the basis of pay, the case may still ultimately be resolved against the Dawsons when the court below addresses the significant different issue in the first instance.

Similarly, the fact that one state court of last resort and an intermediate state appellate court have relied on *Brown* (Pet. 32–33) only supports Petitioners' case for review if that decision is wrong—and it is not, *supra* Part II.

Further, even assuming (contrary to the cases Petitioners have set forth) that some courts are divided about how to apply *Davis* and *Jefferson County*, granting review here would be unlikely to resolve that confusion. At best, there may be a gray zone somewhere between the clear cases of *Davis*-like blanket exemptions for state employees (*e.g.*, *Pledger* and *Kuhn*) on the one hand, and cases like *Brown* and the decision below on the other, where an exemption applies to vanishingly small numbers of state retirees, and federal employees are treated the same as or better than 96% or more of state employees. Unless and until that case arises, however, there is no need for this Court to intervene.

Second, Petitioners' plea that review would provide greater certainty for "the growing population

of both federal and state retirees who budget based on a fixed income" (Pet. 29–32) is also unavailing.

If anything, review would likely *increase* uncertainty for retirees, not resolve it. Petitioners point to a "rush to change state tax and benefit schemes in response to *Davis*," and a corresponding "nationwide outpouring of litigation" when "federal retirees challenged the various revised . . . schemes." Pet. 29–30. The risk of repeating these results are a reason not to wade into this area of the law again without strong reason. After all, a new pronouncement from the Court may prompt States to enact new or revised tax regimes, which may in turn encourage taxpayers unhappy with the new laws to head back to court. In the meantime, state and federal retirees alike will be left with uncertainty from a quickly changing and unsettled legal environment. Without evidence that courts are facing significant division over the proper application of *Davis* and *Jefferson County*, there is no reason to start this cycle anew.

Third, there is no merit to Petitioners' anxiety (at 31) that allowing the decision below to stand might encourage other States to allow "small groups of state retirees" limited tax benefits while "taxing similarly situated federal retirees to cover state costs."

Importantly, Petitioners themselves admit that the national state-law restructuring that occurred

after *Davis* was meant "to achieve *equal treatment* between state and federal retirees," Pet. 29 (emphasis added), not to benefit state retirees at federal workers' expense. There is nothing surprising about this result: State taxpayers retired from the federal government are state residents no less than state-government retirees—and their votes count the same when selecting (or removing) the legislators responsible for state tax laws. This political check becomes stronger still when the interests of a State's federal retirees are combined with those of *non-government* retirees. After all, when States choose to grant a tax exemption to small enclaves of state employees, the "expense" of those benefits is borne by *all other* taxpayers, not just federal workers and retirees. Here, for example, the "cost" of exempting income from the four West Virginia retirement plans falls on the remaining ninety-eight percent of *state* retirees, as well as on all other *private* retirees and the countless number of *non-retired* taxpayers statewide.

There is also no reason to suspect that state courts lack fortitude to correct the small number of discriminatory tax provisions that a state legislature might enact. Indeed, as Petitioners' own examples of *Pledger*, *Kuhn*, and *Hackman* show, federal taxpayers often win intergovernmental tax immunity challenges. In the few cases Petitioners identify where they did not, the exemptions at issue applied to an incredibly small percentage of state employees,

such that it could not "credibly be argued," *Cooper*, 421 Mass. at 561, 658 N.E.2d at 965, that there was an "intent to discriminate" on the basis of a taxpayer's source of income, *Brown*, 191 W. Va. at 121, 443 S.E.2d at 463.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 20, 2017

No. 17-419

IN THE

Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER, AS STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

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INTRODUCTION

The petition established that under this Court's decisions in *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 815-16 (1989), and *Jefferson County, Alabama v. Acker*, 527 U.S. 423 (1999), a state may not impose a heavier tax burden on federal employees than state employees when there are no "significant differences between the two classes." The decision below erroneously departed from this rule by imposing a heavier tax burden on Mr. Dawson than on similarly situated state law-enforcement personnel, and deepened a circuit conflict in the process. The petition also showed that lower courts are struggling with the contours of the intergovernmental tax immunity doctrine and have come to conflicting positions on related issues under this doctrine. These struggles, potentially affecting millions of retirees, will continue without this Court's intervention.

In its Opposition, Respondent does not deny that *Davis* and *Jefferson County* control the outcome here, or that Mr. Dawson's job description is similar to those of the more favorably treated West Virginia state retirees, or that the West Virginia Circuit Court stated that such similarity was "undisputed." Nor does Respondent deny that the tax scheme at issue was intentionally designed to favor certain state retirees over all other retirees. Respondent also does not deny that several courts have followed the prior West Virginia decision in *Brown v. Mierke*, 443 S.E.2d 462 (W. Va. 1994), to reach rulings similar to the one at issue here, or that a ruling from this Court in this case would have far-reaching implications.

Rather, Respondent makes one overarching argument in response – that under *Davis* and *Jefferson County* – a state's less favorable treatment of federal retirees than similarly situated state retirees is permissible so long as the state does not adopt a "blanket" rule favoring state retirees, but rather discriminates only in favor of certain small, subclasses of state retirees. It then urges that this rule explains the conflict in authority in the state courts and suggests that rejecting this narrow discrimination rule would cause a substantial amount of litigation, that it characterizes as unnecessary.

Respondent's argument, however, is plainly wrong under *Davis* and *Jefferson County*. Those cases make clear that, even where the subclasses of employees are small (indeed, in *Jefferson County*, the Court addressed taxes on sitting judges), it is impermissible to treat a class of state employees or retirees more favorably than a similarly situated class of federal employees or retirees.

Once Respondent's fundamental and erroneous reading of *Davis* and *Jefferson County* has been exposed, its other arguments fall away. There is in fact a real conflict between those state courts that faithfully follow this Court's intergovernmental tax immunity cases and those that apply West Virginia's incorrect view as expressed in *Brown*. And the effect of this Court's intervention to correct the ruling below would indeed be widespread, but would be salutary rather than pernicious.

This Court's intervention is warranted.

ARGUMENT

I. *DAVIS* AND *JEFFERSON COUNTY* ESTABLISH THAT A STATE CANNOT TREAT GROUPS OF STATE RETIREES MORE FAVORABLY THAN SIMILARLY SITUATED GROUPS OF FEDERAL RETIREES

1. In *Davis*, this Court very clearly held that "the imposition of a heavier tax burden on those who deal with one sovereign than is imposed on those who deal with the other" must be justified by demonstrating that the disparate treatment is the result of "significant differences between the two classes." 489 U.S. at 815-16. The Court expressly rejected the state's rationale that it had a legitimate interest in hiring qualified civil servants, noting that it was "beside the point," because it was a *reason for* the preferential treatment of state employees, not a *significant difference* between state and federal employees. *Id.*

In *Jefferson County*, this Court reiterated that "a state tax exempting retirement benefits paid by the State but not those paid by the Federal Government" violates the doctrine of intergovernmental tax immunity. 527 U.S. at 442. That case involved the question whether a county could charge an occupational tax on federal judges where the tax generally applied to all persons working within the county who were not otherwise required to pay a license fee under state law. The Court held that, even though some state judges did pay a license fee rather than the tax, the tax was permissible because it did not "discriminate against federal judges in particular, or federal officeholders in general, based on the federal

source of their pay or compensation." *Id.* at 442-443. However, the Court cautioned—"[s]hould Alabama or Jefferson County authorities take to exempting state officials while leaving federal officials (or *a subcategory of them*) subject to the tax, that would indeed present a starkly different case" violating the doctrine of intergovernmental tax immunity. *Id.* at 443 (emphasis added).

2. Respondent claims that *Davis* and *Jefferson County* forbid only a blanket tax exemption for state employees or retirees, but not a narrow one, even where similarly situated federal employees or retirees are treated less favorably. Opp. 25-26. This argument cannot be squared with the actual holdings and language of those cases.

First, both *Davis* and *Jefferson County* contain express language that defeats Respondent's argument. *Davis* plainly states that discrimination between classes of state and federal employees or retirees could be justified only by "significant differences between the two classes." 489 U.S. at 816-17. And *Jefferson County* stated that it would be impermissible to "discriminate against federal judges in particular, or federal officeholders in general." 527 U.S. at 442-443.[1] Thus, the Court expressly stated that not only

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[1] Respondent invokes the Court's description in *Jefferson County* of the "narrow approach" and "tight limits this Court has set" for the doctrine of intergovernmental tax immunity. Opp. 26-27 (quoting 527 U.S. at 436-37). But that language was simply used to distinguish the Eleventh Circuit's holding and historical practices that prevented any form of state taxation on the income of federal employees from the modern doctrine that prohibits only "discriminat[ory]" taxation. 527 U.S.

blanket exemptions, but exemptions favoring subclasses of state employees or retires over federal employees or retirees are impermissible.

Second, while *Davis* did involve a blanket state exemption, nothing in that case indicates that it is limited to such exemptions, and in fact, the language of the case plainly establishes the contrary. *Jefferson County*, on the other hand, did involve a much narrower tax and exemption and made clear that if such a narrow exemption discriminated against a subclass of similarly situated federal employees, it would be invalid. *Id.* There is no persuasive rationale that would support Respondent's reading. The crux of the intergovernmental tax immunity doctrine is to prevent discrimination based on the "federal source" of compensation. *Id.* at 443. But such prohibited discrimination is present whether there is blanket discrimination or more narrow discrimination against federal employees treated less favorably than similarly situated state employees.

Third, Respondent's argument in this regard, if anything, resembles the position of the dissent in *Davis*, which the rest of the Court expressly rejected. The dissent emphasized that the exemption applied only to 130,000 retired state employees out of 4.5 million individual taxpayers and urged that "[t]he fact that a State may elect to grant a preference, or an exemption, to a small percentage of its residents does not make the tax discriminatory in any sense

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(continued...)

at 436. It does not support Respondent's argument that "narrow" discriminatory state taxation is acceptable.

that is relevant to the doctrine of intergovernmental tax immunity." 489 U.S. at 821 (Stevens, J., dissenting). But that reasoning was rejected by the Court in *Davis*, and it cannot carry the day here.

3. Stripped of its erroneous reading of *Davis* and *Jefferson County*, Respondent has no meaningful defense of the decision below. Respondent suggests that the differential tax treatment at issue is not "discriminatory." Opp. 28-29. However, it ignores Respondent's concession in the circuit court that the purpose of the state exemption was to "benefit the narrow class of state law enforcement officers" listed in the statute. Pet.App.23a. The circuit court thus found that the inconsistent tax treatment was "unquestionably based on the source of one's retirement income and precisely the type of favoritism the doctrine of intergovernmental tax immunity prohibits." *Id.* Neither the West Virginia Supreme Court's nor Respondent's wishful recharacterization of the statutory scheme changes that reality.

Respondent also notes that it urged in the West Virginia Supreme Court that there may be "other significant" differences between the class of state retirees that benefit from the exemption and federal retirees such as Mr. Dawson. Opp. 29. But it concedes, as it did in the circuit court, that there are "substantial similarities" in their job descriptions. *Id.*; *see also* Pet.App.22a. (circuit court emphasizing that it is "undisputed" that "there are no significant differences between Mr. Dawson's powers and duties as a U.S. Marshal and the powers and duties of the state and local law enforcement officers listed in [Section 12(c)(6)].").

In short, West Virginia gives preferential tax treatment to a substantial category of state law-enforcement retirees, but does not treat as favorably a similarly situated class of federal law-enforcement retirees. This is forbidden by this Court's precedents, and the decision below warrants review.

II. RESPONDENT FAILS TO REFUTE PERSUASIVELY THE CONFLICT IN THE LOWER COURTS

The petition showed that state courts conflict over their treatment of the intergovernmental tax immunity doctrine, with several faithfully applying this Court's precedents to strike down discriminatory state taxation schemes and others following the West Virginia Supreme Court's prior decision in *Brown* to permit such schemes. Respondent imports its untenable blanket exemption/narrow class distinction in an attempt to explain these cases. But like its mischaracterization of this Court's precedent, this explanation fails.

1. The Supreme Courts of Arkansas, Colorado and Missouri hold that state taxation schemes that treat state employees or retirees more favorably than similarly situated federal employees or retirees are impermissible.

a. **Arkansas.** In *Pledger v. Bosnick*, 811 S.W.2d 286, 288 (Ark. 1991), *abrogated on other grounds by State, Dep't of Fin. & Admin. v. Staton*, 942 S.W.2d 804, 806 (Ark. 1996), the court struck down a scheme that fully exempted retirement income received by retirees from the Arkansas Public Employees, Teachers, State Highway Police, and State Highway Employees Retirement Systems, while allowing only a

$6,000 exemption for all other retirees. The court held that "the tax discriminate[d] based upon the source of the payment," because state retirees were exempted and similarly situated federal employees were not. 811 S.W.2d at 292.

Respondent argues that because the question in *Pledger* was whether the discrimination was based on the source of the income, the court's failure to discuss any difference between blanket and narrow exemptions is unsurprising. Opp. 12-14. But *Pledger* was not a blanket exemption case. Only certain specific state retirement programs were at issue, just as here. *See, e.g., Landers v. Stone*, 496 S.W.3d 370 (Ark. 2016) and *Rothbaum v. Arkansas Local Police & Fire Ret. Sys.*, 55 S.W.3d 760 (Ark. 2001) (describing other programs). And *Pledger* did not mention any distinction between discriminatory blanket and narrow exemptions. Its reasoning, therefore, is contrary to that of the West Virginia Supreme Court and the other courts to have adopted similar reasoning.

b. **Colorado**. *Kuhn v. State Department of Revenue of State of Colorado*, 817 P.2d 101, 103 (Colo. 1991) (en banc), similarly struck down a taxing scheme that discriminated in favor of state retirees and against federal military retirees. The court explained that Davis "prohibit[s]" taxes "that discriminate between state and federal workers based on the source of the income" unless the inconsistent treatment is justified by significant differences between the classes. *Id.* at 107 (citing *Davis*, 489 U.S. at 816). The court said nothing to indicate that the holding in Davis is limited to blanket tax exemptions.

Respondent again argues that it is not surprising that *Kuhn* did not mention any significance of the "blanket" nature of the state exemption. Opp. 14-16. But if the court in *Kuhn* had either adopted a blanket/narrow exemption distinction or reasoned that *Davis* made such a distinction, surely it would have mentioned it in its decision.

c. **Missouri.** In *Hackman v. Director of Revenue*, 771 S.W.2d 77, 79 (Mo. 1989), the court followed *Davis* to invalidate several statutory exemptions for subgroups of state retirees that did not similarly exempt federal retirees. Respondent seizes upon the court's language that "[t]he effect of Missouri's scattered retirement benefit [exemption] statutes is identical to that of Michigan's exemption statute for purposes of a *Davis* analysis." Opp. 16-17 (quoting *Hackman*, 772 S.W.2d at 80). But, it is not clear that the court meant that aggregating the subgroups in the different listed exemptions created a blanket exemption. Rather, the court emphasized that the state exemptions had the legal effect of a violation of the intergovernmental tax immunity doctrine. In any event, *Hackman* certainly did not adopt or mention any blanket/narrow exemption distinction.

2. Conversely, several courts have upheld discriminatory state taxation schemes following *Davis*.

a. **West Virginia.** In *Brown*, the West Virginia Supreme Court rejected a challenge by federal military retirees, who claimed that they were entitled to tax exemptions provided to certain allegedly similarly situated state retirees. 443 S.E.2d 462. The decision below followed *Brown*, rather than this Court's decision in *Davis*. Pet. 5-6.

Respondent concedes that "neither *Brown* nor the decision below turned on a finding that discriminatory tax treatment was 'justified by significant differences between the two classes of employees.'" Opp. 20 (quoting *Davis*, 489 U.S. at 815). Respondent urges that such a justification was not necessary because the tax schemes did not impermissibly discriminate on the basis of the source of the federal retirees' income. Opp. 20. But that argument just repeats the erroneous blanket/narrow exemption distinction that the court below originally adopted in *Brown* and repeated in this case. That distinction conflicts with this Court's rulings and the rulings of the Arkansas, Colorado and Missouri Supreme Courts. *Brown* has been adopted by the courts of other states, further cementing the conflict this Court should reconcile.

b. **New Mexico.** In *Alarid v. Secretary of N.M. Department of Taxation and Revenue*, 878 P.2d 341, 343 (N.M. Ct. App. 1994), the court rejected the challenge of retirees from Los Alamos National Laboratory whose retirement income, paid by the University of California through a federal contract, was taxed differently from that of retirees from other New Mexico educational institutions. The court followed *Brown*, reasoning that granting narrow tax exemptions to state employees does not pose the same concerns as the blanket exemptions struck down in *Davis*: "[t]he fact that the State has chosen to exempt from state tax one limited class of state retirees does not mean Plaintiffs are being illegally discriminated against." *Id.* at 347 (citing *Brown*, 443 S.E.2d at 462).

Respondent is correct that this decision is from the New Mexico Court of Appeals (it was inadvertently

misidentified in the Petition), Opp. 20-21, but Respondent points to no decision from the New Mexico Supreme Court contradicting it; and that court denied certiorari in *Alarid*, and could have reviewed that decision if it determined it to be erroneous. Respondent's other argument, that the retirement funds, while owned by the federal government, were paid by California, *id.* is a distinction without a difference. As part of its holding, the court analyzed whether plaintiffs were discriminated against because of the affiliation of their retirement funds with the federal government and reasoned that they were not, based upon *Brown*. That the court addressed other principles also applicable in this particular case does not negate that holding.

c. **Massachusetts**. In *Cooper v. Commissioner of Revenue*, 658 N.E.2d 963, 963 (Mass. 1995), the Massachusetts Supreme Court likewise followed *Brown* to uphold state tax exemptions for certain state employees that did not extend to similarly situated federal employees. It reasoned that because the tax provision at issue favored a "small and dwindling class" of state retirees, it could not constitute "discrimination against federally funded benefits." *Id.* at 965 (citing *Brown*, 443 S.E.2d at 462; *Alarid*, 878 P.2d at 341).

Respondent urges that the decision was based on the date of hire and the occupation of the exempted state retirees, Opp. 22-23, but the exemption did not apply to similarly situated federal retirees regardless of their date of hire. Thus, by definition, it discriminated based on the source of the retirement funds. *Cooper* thus shows the erroneous expansion of *Brown*.

3. Respondent does not dispute conflicts in the state courts regarding related issues involving similar arguments to circumvent this Court's rulings in *Davis* and *Jefferson County*. Pet. 21-25. Rather, Respondent asserts that the presence of these cases actually undermines the case for review here. Opp. 23-25. To the contrary, those cases plainly demonstrate the confusion in the lower courts over the proper interpretation of this Court's rulings. Moreover, resolution of the core issue presented in this case would help resolve this confusion. If the blanket/narrow class distinction is struck down or clarified, the lower courts would be far better able to appropriately address these related issues.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO DECIDE THIS IMPORTANT AND RECURRING QUESTION

1. Respondent does not deny that there is a great deal of litigation in the state courts over the question presented and similar issues. Rather, Respondent asserts that granting review would create additional, unnecessary litigation. Opp. 29-33. But the reality is that clarification of this Court's previous rulings would increase certainty and likely lead to the elimination of taxation schemes designed to circumvent those rulings. To the extent any additional litigation is generated, it would be with the purpose of eliminating impermissible discrimination in taxation. That is a salutary outcome.

2. Respondent also suggests that because this Court denied certiorari in *Brown* in 1994, it should do so here. Opp. 27. But that ignores the role *Brown* has played since then in making mischief and lead-

ing to erroneous results like that below. Again, this favors review.

CONCLUSION

The petition should be granted. Alternatively, because the decision below is so plainly contrary to this Court's precedent, summary reversal is warranted.

Respectfully submitted,

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DECEMBER 5, 2017

No. 17-419

In the Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON, PETITIONERS

v.

DALE W. STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. 111, prohibits the State of West Virginia from exempting from state taxation the retirement benefits of certain former state law-enforcement officers, without providing the same exemption for the retirement benefits of former employees of the United States Marshals Service.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. In *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court held that the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, barred the State of Maryland from imposing a discriminatory tax on the Bank of the United States. "For a time, *McCulloch* was read broadly to bar most taxation by one sovereign of the employees of another," on the theory that "'any tax on income a party received under a contract with the government was a tax on the contract and thus a tax on the government because it burdened the government's power to enter the contract.'" *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 810-811 (1989) (citation and internal

quotation marks omitted); see *Jefferson Cnty.* v. *Acker*, 527 U.S. 423, 436 (1999). In the late 1930s, however, "the Court began to turn away from its more expansive applications of the immunity doctrine," holding that "intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt." *Davis*, 489 U.S. at 811 (citing *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938), and *Graves* v. *New York*, 306 U.S. 466 (1939)); see *Jefferson Cnty.*, 527 U.S. at 436-437.

"[C]ongressional action coincided" with that shift in this Court's jurisprudence. *Jefferson Cnty.*, 527 U.S. at 437. When "Congress decided to extend the federal income tax to state and local government employees," it sought to "ensure that federal employees would not remain immune from state taxation." *Davis*, 489 U.S. at 811-812. To achieve that goal, Congress enacted Section 4 of the Public Salary Tax Act of 1939, ch. 59, 53 Stat. 575, the predecessor to 4 U.S.C. 111. Today, that provision states:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, * * * by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

4 U.S.C. 111.

This Court has held that "the retention of immunity" in Section 111's last clause "is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental

tax immunity." *Davis*, 489 U.S. at 813; see *Jefferson Cnty.*, 527 U.S. at 437.[1] To determine whether a state tax complies with Section 111, "the relevant inquiry is whether" the imposition of a heavier tax burden on federal employees "is directly related to, and justified by, 'significant differences between the two classes.'" *Davis*, 489 U.S. at 816 (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)).

2. West Virginia provides a total exemption from state income taxation for benefits from four retirement plans: (1) the Municipal Police Officer and Firefighter Retirement System (MPFRS); (2) the Deputy Sheriff Retirement System (DSRS); (3) the State Police Death, Disability and Retirement Fund (Trooper Plan A); and (4) the West Virginia State Police Retirement System (Trooper Plan B). Pet. App. 3a & n.3; see W. Va. Code Ann. § 11-21-12(c)(6) (LexisNexis 2017) (Section 12(c)(6)). West Virginia also exempts from taxation the first $2000 in benefits received each year under the West Virginia Public Employees Retirement System, the West Virginia State Teachers Retirement System, or "any federal retirement system to which Title 4 U.S.C. § 111 applies." W. Va. Code Ann. § 11-21-12(c)(5) (LexisNexis 2017).[2] In addition, at all relevant times, West Virginia exempted from taxation "the first

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[1] For that reason, this brief refers to the constitutional and statutory nondiscrimination requirements interchangeably. See Pet. 8 n.2; Br. in Opp. 5.

[2] West Virginia does not exempt from state income taxation any benefits received under the State's Emergency Medical Services Retirement System or its Judges' Retirement System. See W. Va. Code Ann. § 11-21-12(c) (LexisNexis 2017); *id.* §§ 16-5V-4, 51-9-1 (LexisNexis 2016); Pet. App. 13a, 15a & n.11.

[$20,000] of military retirement income," *i.e.*, "retirement income from the regular armed forces, reserves and National Guard." *Id.* § 11-21-12(c)(7)(B); Pet. App. 3a.[3] And West Virginia exempts from taxation $8000 of income "received from any source" by individuals who are age 65 or older, or who are "permanently and totally disabled." W. Va. Code Ann. § 11-21-12(c)(8) (LexisNexis 2017). See generally Pet. App. 2a-4a.

3. In 2008, petitioner James Dawson retired from the United States Marshals Service. Pet. App. 4a. Mr. Dawson had served for most of his career as a Deputy U.S. Marshal before the President appointed him as the U.S. Marshal for the Southern District of West Virginia. *Ibid.* During his tenure with the Marshals Service, Mr. Dawson was enrolled exclusively in the Federal Employee Retirement System (FERS), and he currently receives benefits from FERS. *Ibid.* Under West Virginia law, Mr. Dawson may exempt at least $2000 of his FERS income from his state taxable income. W. Va. Code Ann. § 11-21-12(c)(5) (LexisNexis 2017); Pet. App. 4a.

In October 2013, Mr. Dawson and his wife, petitioner Elaine Dawson, filed amended tax returns for 2010 and 2011. Pet. App. 4a. Petitioners claimed an adjustment exempting all of Mr. Dawson's FERS retirement income from state taxation pursuant to Section 12(c)(6), the provision that fully exempts state retirement benefits under MPFRS, DSRS, Trooper Plan A, and Trooper Plan B. *Ibid.*; see Pet. 2-3. The Tax Commissioner disallowed the exemption. Pet. App. 4a.

Petitioners appealed to the West Virginia Office of Tax Appeals. Petitioners contended that West Virginia's

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[3] For taxable years beginning after December 31, 2017, West Virginia has exempted from state income taxation all military retirement income. W. Va. Code § 11-21-12(c)(7)(C) (2018).

differential treatment of Mr. Dawson's retirement benefits violated 4 U.S.C. 111 because no significant differences exist between Mr. Dawson's law-enforcement duties at the U.S. Marshals Service and the duties of state law-enforcement personnel whose retirement benefits are fully exempt from taxation under Section 12(c)(6). Pet. App. 4a-5a. The Office of Tax Appeals rejected petitioners' argument. *Id.* at 5a.

The Circuit Court of Mercer County reversed. Pet. App. 17a-25a. The court acknowledged that in *Brown* v. *Mierke*, 443 S.E.2d 462, cert. denied, 513 U.S. 877 (1994), the West Virginia Supreme Court of Appeals had held that military retirees were not entitled to claim the state tax exemption under Section 12(c)(6). Pet. App. 21a. The court found *Brown* distinguishable, however, because the military retirees who had brought that suit "did not have a state counterpart identified" in Section 12(c)(6). *Ibid.*; see *id.* at 23a. Here, by contrast, the Circuit Court found it "undisputed * * * that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers" who receive the full tax exemption. *Id.* at 22a. Applying *Davis* to this case, the court held that Section 12(c)(6) imposes "inconsistent tax treatment * * * based on the source of one's retirement income" -"precisely the type of favoritism the doctrine of intergovernmental tax immunity prohibits." *Id.* at 23a.

4. The West Virginia Supreme Court of Appeals reversed. Pet. App. 1a-16a. Applying *Brown*'s "totality of the circumstances" approach, the court observed that Mr. Dawson had "received more favorable tax treatment than state civilian retirees" and certain state

judges, and that he had received "the same tax treatment as the vast majority of all state retirees," who also may exempt $2000 of retirement benefits from their taxable income. *Id.* at 14a-15a. The court further explained that "only some law enforcement officers * * * are permitted to rely upon the Section 12(c)(6) exemption," which covers only "two percent of all state-pension recipients." *Id.* at 15a-16a. Because "that benefit was not intended to discriminate against federal marshals," the court found it consistent with 4 U.S.C. 111. Pet. App. 16a. The court did not consider whether there are any significant differences between U.S. Marshals and the state and local law-enforcement officers who receive Section 12(c)(6)'s full exemption that could justify their differential treatment.

DISCUSSION

The West Virginia Supreme Court of Appeals misapplied the doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. 111. Under the test articulated in *Davis* v. *Michigan Department of the Treasury*, 489 U.S. 803 (1989), the court should have asked whether the State's inconsistent tax treatment of former federal and state law-enforcement officers "is directly related to, and justified by, 'significant differences between the two classes.'" *Id.* at 816 (citation omitted). Instead, the court below engaged in a "totality of the circumstances" analysis, essentially holding that so long as Mr. Dawson was treated better than *most* state and private employees, no unlawful discrimination occurred. Pet. App. 14a-16a. That reasoning is inconsistent with *Davis* and with this Court's other intergovernmental-tax-immunity decisions.

Whether this Court's review is warranted presents a closer question. Since this Court's decision in *Davis*, intergovernmental-tax-immunity issues have not arisen

with great frequency. Between 1994 and 1996, this Court denied three petitions for certiorari seeking review of state-court decisions that, in the view of the United States, misapplied *Davis*.[4] This case appears, however, to be a better vehicle than those cases for clarifying the applicability of *Davis* to state taxation schemes that single out certain groups of state employees or retirees for favorable tax treatment. On balance, we believe that this issue has sufficient legal and practical importance to warrant the Court's review.

1. a. Section 111 permits state taxation of federal officers' or employees' compensation—including retirement benefits, see *Davis*, 489 U.S. at 808-809—only "if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. 111. In *Davis*, this Court explained that "'[t]he imposition of a heavier tax burden'" on those who deal with the federal government "'than is imposed on'" those who deal with the State "'must be'" "directly related to, and justified by, 'significant differences between the two classes.'" 489 U.S. at 815-816 (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960) (brackets in original)); see *Barker* v. *Kansas*, 503 U.S. 594, 598 (1992). "In determining whether this standard of justification has been met, it is inappropriate to rely solely on the mode of analysis developed in [this Court's] equal protection cases." *Davis*, 489 U.S. at 816. When a State legislates concerning economic matters unrelated to the activities of the federal government, the "power to classify is * * * extremely

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[4] See *Cooper* v. *Massachusetts Comm'r of Revenue*, 517 U.S. 1221 (1996) (No. 95-1542); *Alarid* v. *Secretary*, 513 U.S. 1081 (1995) (No. 94-840); *Brown* v. *Paige*, 513 U.S. 877 (1994) (No. 94-246).

broad, and [the State's] discretion is limited only by constitutional rights and by the doctrine that a classification may not be" arbitrary. *Phillips Chem. Co.*, 361 U.S. at 385. But when a State taxes "those who deal with the [federal] Government," it must treat those taxpayers "as well as it treats those with whom it deals itself." *Ibid.*

The Court applied that principle in *Davis* and in *Jefferson County* v. *Acker*, 527 U.S. 423 (1999). In *Davis*, the Court held that Michigan had violated Section 111 by exempting from state taxation all retirement benefits paid by the State or its political subdivisions, while failing to extend the same exemption to retirement benefits paid to federal retirees. 489 U.S. at 805-806, 815-817. In *Jefferson County*, by contrast, the Court held that a county's occupational tax on the gross receipts of persons working within the county who were not otherwise subject to a license fee under state law did not violate Section 111. 527 U.S. at 429, 442-443. Federal judges sitting in the county argued that the tax discriminated against them because they could never hold other state or local licenses. *Id.* at 443. In rejecting that challenge, the Court explained that, because "[t]he tax is paid by all State District and Circuit judges in Jefferson County and the three State Supreme Court justices who have satellite offices in that county," there was "no discrimination * * * between similarly situated federal and state employees." *Ibid.* The Court observed, however, that if the State or county adopted a tax regime "exempting state officials while leaving federal officials (or a subcategory of them) subject to the tax, that would indeed present a starkly different case." *Ibid.*[5]

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[5] This Court also applied Section 111 in *Barker*, *supra*. That case concerned whether military retirement benefits could be considered

The decision below is inconsistent with the most natural understanding of *Davis* and *Jefferson County*. West Virginia fully exempts from its income tax the retirement benefits of certain state law-enforcement officers, while providing a lesser exemption for the retirement benefits received by federal law-enforcement officers like Mr. Dawson. The Circuit Court of Mercer County found it "undisputed * * * that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers listed in [Section 12(c)(6)]." Pet. App. 22a. The West Virginia Supreme Court of Appeals did not cast doubt on that view of the record. See *id.* at 12a-16a; p. 19, *infra*. If that understanding of the facts is correct (but see Br. in Opp. 29-30), West Virginia's differential taxing scheme impermissibly discriminates between "similarly situated federal and state employees" based on the "source of their pay or compensation." *Jefferson Cnty.*, 527 U.S. at 443 (emphasis omitted).

b. The West Virginia Supreme Court of Appeals reached a contrary conclusion because it misconstrued this Court's precedents. As it had done in *Brown* v. *Mierke*, 443 S.E.2d 462, cert. denied, 513 U.S. 877 (1994), the court interpreted *Davis* to permit a totality-of-the-circumstances inquiry designed to "ascertain whether the intent of the scheme is to discriminate against employees

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"current compensation for reduced current services," thus rendering them "significantly different" from the exempted benefits of state retirees. 503 U.S. at 605. The Court concluded that, "[f]or purposes of 4 U.S.C. § 111, military retirement benefits are to be considered deferred pay for past services," and that "[i]n this respect they are not significantly different from the benefits paid to Kansas state and local government retirees." *Ibid.*

or former employees of the federal government" by comparing the treatment of federal retirees to the treatment of various classes of state, local, and private retirees. Pet. App. 14a-15a. Because Section 12(c)(6) grants preferential tax treatment to a relatively small subset of state retirees—and because Mr. Dawson received equal or better treatment than many other state, local, and private retirees—the court below concluded that the statute was enacted to benefit a narrow class of former state employees, rather than to discriminate against federal retirees. *Id.* at 14a-16a.

That approach is inconsistent with *Davis*. The court in *Brown* read *Davis* as limited to its facts, *i.e.*, a state provision that "fully taxed all federal pensions while exempting *all* state pensions." *Brown*, 443 S.E. 2d at 466; see Pet. App. 9a (emphasizing that *Davis* concerned a "blanket state tax exemption"); Br. in Opp. 11-12, 14, 25 (same). The result in *Davis*, however, turned not on the number of retirees who received the tax exemption, but on whether "significant differences between" the groups that did and did not receive it "justified" the differential treatment. 489 U.S. at 816; see *Barker*, 503 U.S. at 600. In *Jefferson County* as well, the Court focused not on the overall number of workers who might be exempt from the tax at issue, but on whether the scheme treated "similarly situated federal and state employees" differently. 527 U.S. at 443.

To be sure, the Court in *Davis* described the challenged Michigan law as providing a "blanket exemption" for state retirement benefits. 489 U.S. at 817. The Court made that observation, however, only to explain its rejection of the State's argument that "substantial differences in the value" of state and federal benefits justified the differential tax treatment. *Id.* at 816. The

Court observed that, "[w]hile the average retired federal civil servant receives a larger pension than his state counterpart, there are undoubtedly many individual instances in which the opposite holds true." *Id.* at 817. The Court explained that, if Michigan "truly intended to account for differences in retirement benefits," it would not provide a "blanket exemption" for state benefits, but would instead distinguish "on the basis of the amount of benefits received by individual retirees." *Ibid.* Although the Michigan taxing scheme at issue in *Davis* provided a "blanket exemption" for state retirees, the rationale for the Court's decision was not limited to such laws.

By focusing on the total number of state retirees who do not receive Section 12(c)(6)'s exemption, the court below engaged in an analysis similar to that of the dissent in *Davis*. See Pet. Reply Br. 5-6. There, Justice Stevens would have held that the Michigan taxing scheme did not violate Section 111 because it "applie[d] equally to the vast majority of Michigan residents, including federal employees," and exempted "only the 130,000 retired state employees." *Davis*, 489 U.S. at 818, 821 (Stevens, J., dissenting). In Justice Stevens's view, "[t]he fact that a State may elect to grant a preference, or an exemption, to a small percentage of its residents does not make the tax discriminatory in any sense that is relevant to the doctrine of intergovernmental tax immunity." *Id.* at 821; see *Barker*, 503 U.S. at 605-606 (Stevens, J., concurring) (similar). The Court rejected that approach, however, explaining that "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in

privity with it," even if it treats federal employees no worse than private workers. 489 U.S. at 815 n.4.[6]

It also is not dispositive that, with respect to the taxation of retirement benefits, West Virginia law treats Mr. Dawson better than some state and local retirees. To be sure, that aspect of the West Virginia scheme highlights the importance of determining *which* state retirees are most similarly situated to Mr. Dawson. If state law treats Mr. Dawson as well as or better than it treats the most similarly situated state retirees, West Virginia's refusal to provide him an exemption that *other* state retirees receive would not be based on "the source of [Mr. Dawson's] pay or compensation." 4 U.S.C. 111. In this case, however, the Circuit Court found it "undisputed * * * that there are no significant differences between" Mr. Dawson and the state law-enforcement officers who receive a full exemption under Section 12(c)(6). Pet. App. 22a. This Court's decisions applying Section 111 do not suggest that a State may treat federal employees worse than a segment of

---

[6] Indeed, the argument that providing a benefit to state employees does not constitute discrimination against federal employees had greater force in *Davis* than it has here. Because the Michigan scheme exempted all state retirees, including those who performed jobs with both federal- and private-sector analogues, the law did not single out federal retirees for inferior treatment. For example, while a retired federal paralegal could not claim the Michigan tax exemption, a retired law-firm paralegal could not do so either. The tax benefit that West Virginia provides, by contrast, goes to state law-enforcement personnel who generally lack private-sector counterparts. The exclusion of similarly situated federal law-enforcement personnel thus may be viewed as a more targeted form of discrimination against federal retirees.

similarly situated state employees, so long as it treats them better than some *other* state workers.[7]

The court below also suggested that Section 111 is satisfied whenever the State identifies a salutary motive for its differential tax scheme. See Pet. App. 16a (finding it significant that the West Virginia scheme was intended to "give[] a benefit to a very narrow class of former state and local employees"); *id.* at 10a (similar). Under *Davis*, however, the "State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant" to the dispositive "inquiry into the nature of the two classes receiving inconsistent treatment." 489 U.S. at 816. Thus, just as it was "wholly beside the point" in *Davis* that Michigan wished to "hir[e] and retain[] qualified civil servants through the inducement of a tax exemption for retirement benefits," *ibid.*, it is irrelevant here that West Virginia wishes to "give a benefit to a narrow class of state retirees," Pet. App. 15a. For the same reason, the absence of a discriminatory motive or animus against federal employees does not demonstrate that the tax complies with Section 111. But see *id.* at 10a, 16a (suggesting that lack of discriminatory intent is material).

Respondent is also incorrect in describing (Br. in Opp. 26) *Jefferson County* as "uph[o]ld[ing] a tax exemption that the county made available to *some* state

---

[7] The West Virginia Supreme Court of Appeals' analysis is also inconsistent with usual understandings of what it means to "discriminate" based on a prohibited criterion. An employer that paid its female executives less than its male executives, for example, could not escape liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, simply by showing that executives formed a small percentage of the company's overall workforce, or that female executives were paid as well as or better than male rank-and-file employees.

and local judges, but *no* federal judges." To the contrary, the Court in that case explained that "all State District and Circuit Court judges in Jefferson County and the three State Supreme Court justices who have satellite offices in the county" paid the tax. 527 U.S. at 443; see Resp. Br. at 36, *Jefferson Cnty.*, *supra* (No. 98-10) (arguing that the tax violated 4 U.S.C. 111 despite the "parity of treatment between federal and state judges"). Indeed, the Court upheld the provision for just that reason, observing that "[t]he record show[ed] no discrimination * * * between similarly situated federal and state employees." 527 U.S. at 443. The Court further explained that, if the "Alabama or Jefferson County authorities" decided to "exempt[] state officials while leaving federal officials (or a subcategory of them) subject to the tax, that would indeed present a starkly different case." *Ibid.* Respondent construes (Br. in Opp. 26) this statement to mean only that "States cannot evade the logic of *Davis* by adopting a blanket exemption for all state retirees, and bringing a select few federal employees along for the ride." Particularly when read in context, however, the Court's statement is best understood as reiterating the rule that States must treat similarly situated state and federal employees alike. See 527 U.S. at 443.[8]

2. Although the question presented here has not arisen with great frequency, it has sufficient legal and practical importance to warrant this Court's review.

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[8] Even if some state judges, but no federal judges, had benefitted from the tax exemption in *Jefferson County*, that would not necessarily demonstrate a violation of Section 111. The provision would still stand if the differential treatment were based on a neutral, nonpretextual characteristic, rather than the federal source of compensation.

a. i. Petitioner identifies (Pet. 11-15) three state appellate courts that have correctly applied *Davis* to invalidate discriminatory taxing schemes. In *Hackman* v. *Director of Revenue*, 771 S.W.2d 77 (1989) (en banc), cert. denied, 493 U.S. 1019 (1990), the Supreme Court of Missouri held that the State's system of taxation violated Section 111 because it exempted the receipt of "certain retirement benefits paid" to state retirees while providing no corresponding exemption for federal retirees. *Id.* at 78; see *id.* at 80. In *Pledger* v. *Bosnick*, 811 S.W.2d 286 (1991), cert. denied, 509 U.S. 921 (1993), the Supreme Court of Arkansas held that Arkansas's taxing scheme, which provided a full exemption for retirement income from "the Arkansas Public Employees, Teachers, State Highway Police, and State Highway Employees Retirement Systems, while allowing an exemption for only the first $6,000 of" federal retirement and other retirement benefits, impermissibly discriminated against federal retirees. *Id.* at 288; see *id.* at 291-292. And in *Kuhn* v. *State Department of Revenue*, 817 P.2d 101 (1991) (en banc), cert. denied, 504 U.S. 901 (1992), the Supreme Court of Colorado held that the State's differential treatment of federal military retirees, as compared to state, private, and other federal retirees, could not be squared with the doctrine of intergovernmental tax immunity. *Id.* at 107-109.

ii. Three other state appellate courts have applied an erroneous totality-of-the-circumstances approach to determine whether a tax is discriminatory in violation of Section 111. See Pet. 15-21.

In *Brown*, *supra*, the West Virginia Supreme Court of Appeals rejected a challenge by retired military personnel to a prior version of West Virginia's income-tax statute, which provided a $2000 exemption for military

pensions while fully exempting "certain firefighters' and police officers' retirement benefits." 443 S.E.2d at 465. Because the full exemption was "surpassingly narrow"—"less than four percent of all *State* government retirees in West Virginia" received it—the court determined that "there is no intent * * * to discriminate *against* federal retirees; rather, the intent is to give a benefit to a very narrow class of former state and local employees." *Id.* at 465-466. In light of these "specialized circumstances," the court concluded that *Davis* and *Barker* were not "controlling," and that the State's taxing scheme complied with Section 111. *Id.* at 465. In the decision below, the West Virginia Supreme Court of Appeals relied heavily on its analysis in *Brown*. Pet. App. 9a-16a.

The Court of Appeals of New Mexico applied a similar totality-of-the-circumstances approach in *Alarid* v. *Secretary of New Mexico Department of Taxation & Revenue*, 878 P.2d 341, cert. denied, 879 P.2d 91 (N.M. 1994) (Tbl.), and 513 U.S. 1081 (1995). The court first held that, because the retiree plaintiffs were paid by the State of California rather than by the federal government, "the 'legal incidence' of the tax" did not fall on the federal government, and Section 111 did "not apply." *Id.* at 345. The court went on to note, however, that "[t]he fact that the State has chosen to exempt from state tax one limited class of state retirees does not mean Plaintiffs are being illegally discriminated against." *Id.* at 347. As support for that approach, the court cited *Brown* and a concurring opinion in *Barker*, in which Justice Stevens reiterated his view that "[a] state tax burden that is shared equally by federal retirees and the vast majority of the State's citizens does not discriminate against those retirees." *Ibid.* (citation

omitted; brackets in original). The court in *Alarid* failed to acknowledge that Justice Stevens's position had not carried the day in *Davis*. See *ibid.*; *Barker*, 503 U.S. at 606 (Stevens, J., concurring).

The Supreme Judicial Court of Massachusetts engaged in a similar analysis in *Cooper* v. *Commissioner of Revenue*, 658 N.E.2d 963 (1995), cert. denied, 517 U.S. 1221 (1996). The state law at issue there exempted from taxation income from any federal, state, or local "contributory annuity, pension, endowment or retirement fund." *Id.* at 964 (citation omitted). The law required employees (like the military-retiree plaintiffs) who did not contribute a portion of their salary to the retirement system to pay state taxes on their benefits. *Ibid.* The court concluded that the statute distinguished not between federal and state employees, but instead between "contributory and noncontributory retirement plans." *Ibid.* In addition, relying on *Brown* and *Alarid*, the court held that the statute's grandfather provision exempting income from certain noncontributory state plans did not violate Section 111. *Id.* at 965-966. The court explained that, because the grandfather provision "protect[ed] a small and dwindling class" of state retirees, it did not "constitute[] 'discrimination against federally funded benefits.'" *Id.* at 965 (quoting *Barker*, 503 U.S. at 604-605).

iii. Respondent suggests (Br. in Opp. 18) that these decisions merely "appl[ied] the same legal principles" to "different facts." In respondent's view, *Hackman*, *Pledger*, and *Kuhn* involved "blanket" exemptions like the one at issue in *Davis*, while *Brown*, *Alarid*, and *Cooper* (like this case) concerned state taxation schemes that singled out a relatively small subset of state employees to receive a tax benefit. But as respondent

acknowledges (*id.* at 30), that distinction makes a difference only if *Davis*'s application is limited to "blanket" exemptions for state benefits. See, *e.g.*, *id.* at 11. Because that understanding of *Davis* is incorrect (see pp. 7-14, *supra*), the state-court decisions applying the totality-of-the-circumstances approach are inconsistent with this Court's precedents.

b. This Court's review is warranted to clarify the appropriate inquiry under Section 111. To be sure, since *Davis*, intergovernmental-tax-immunity issues have not arisen with great frequency, see Br. in Opp. 27 & n.3, and this Court denied certiorari in *Brown*, *Cooper*, and *Alarid*. See *Brown* v. *Paige*, 513 U.S. 877 (1994) (No. 94-246); *Cooper* v. *Massachusetts Comm'r of Revenue*, 517 U.S. 1221 (1996) (No. 95-1542); *Alarid* v. *Secretary*, 513 U.S. 1081 (1995) (No. 94-840). But this case presents a better vehicle for the Court's review than did any of those cases.

As discussed above, the West Virginia Supreme Court of Appeals in *Brown* announced the totality-of-the-circumstances test and relied on it to reject a challenge to West Virginia's taxing scheme. See 443 S.E.2d at 465-468. But *Brown*'s result was supported by an independent rationale: the military-retiree plaintiffs there had "failed to demonstrate that their job descriptions during any substantial part of their active service corresponded to the job descriptions of municipal firefighters, municipal police officers or state police officers." *Id.* at 465; see *id.* at 467 n.2. It therefore was unclear whether those plaintiffs were similarly situated to any state retirees who received more favorable tax treatment. If this Court had granted certiorari in *Brown*, it might have affirmed the state

court's judgment without deciding whether the totality-of-the-circumstances approach is consistent with *Davis*.

By contrast, this case squarely presents that question. The Circuit Court found it "undisputed * * * that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers" who receive the full exemption. Pet. App. 22a. The West Virginia Supreme Court of Appeals did not analyze that question. If this Court grants certiorari and vacates the judgment below, the West Virginia Supreme Court of Appeals can consider on remand any preserved arguments respondent may have that Mr. Dawson is not in fact similarly situated to state retirees who receive more favorable tax treatment. Cf. Br. in Opp. 29-30.

The retirees in *Alarid* had worked in the State of New Mexico for the University of California, but were paid under a contract between that university and the United States Department of Energy. 878 P.2d at 343; Pet. at 2, *Alarid*, *supra* (No. 94-840). The case therefore presented questions regarding whether the doctrine of intergovernmental tax immunity applies between the States, and whether the incidence of the tax fell on the federal government; it did not squarely present the question whether the totality-of-the-circumstances approach is consistent with Section 111 or with this Court's analysis in *Davis*. See Pet. at i, *Alarid*, *supra* (No. 94-840). And because *Cooper* concerned in part a grandfather provision that applied only to police and firefighters who were first employed before 1938—a group that was "small and dwindling" by the mid-1990s when the case was decided—the application of *Davis* to

that scheme at least arguably presented an issue of diminishing importance. 658 N.E.2d at 965; see Br. in Opp. at 19-20, *Cooper*, *supra* (No. 95-1542).[9]

Unlike *Brown*, *Alarid*, and *Cooper*, this case cleanly presents the question whether a State may provide a tax benefit to a subgroup of state employees (or retirees) but not to similarly situated federal employees (or retirees). Because state appellate courts have disagreed as to the proper mode of analysis in these circumstances, this Court's review is warranted.

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[9] In *Cooper*, the United States urged this Court to grant certiorari on the broader question whether Massachusetts's distinction between contributory and noncontributory retirement plans contravened *Davis*. Gov't Amicus Br. at 5-6, *Cooper*, *supra* (No. 95-1542). In *Davis*, this Court explained that "[a] tax exemption truly intended to account for differences in retirement benefits * * * would discriminate on the basis of the amount of benefits received by individual retirees." 489 U.S. at 817. Under analogous reasoning, the United States urged, an exemption intended to account for an employee's prior contributions would apportion the tax exemption to match the level of previously taxed contributions. Gov't Amicus Br. at 6-7, *Cooper*, *supra* (No. 95-1542). The United States further argued that the grandfather provision—which wholly exempted benefits paid under some older, state noncontributory retirement plans—demonstrated that "the State's 'nondiscriminatory' rationale [was] inconsistent with the State's facially discriminatory legislation." *Id.* at 6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Attorneys

MAY 2018

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* The Solicitor General is recused in this case.

No. 17-419

IN THE

Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER, AS STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 19, 2017
CERTIORARI GRANTED JUNE 25, 2018

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GENERAL DOCKET
SUPREME COURT OF APPEALS OF WEST VIRGINIA

CLERK'S OFFICE | DOCKET SHEET

General Case Information

Case Number:	16-0441	Filing Date:	04/29/2016 12:00:00 AM
Case Title:	Dale W. Steager, State Tax Commissioner v. James D. Dawson and Elaine F. Dawson		
Case Type:	Administrative – Tax	Case Status:	Disposed
County:	Mercer		
Disposition Method:	Mandate	Disposition Date:	06/22/2017 3:27:50 PM

Action Log

Action Date	Action
	* * *
08/02/2016	Filed Petitioner's Brief.
08/02/2016	Filed Appendix
09/12/2016	Filed Respondent's Brief
10/03/2016	Filed Reply Brief
	* * *
05/17/2017	Issued Memorandum Decision. Reversed and remanded.
	* * *

GENERAL DOCKET
CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

CASE 15-C-326

JAMES DAWSON VS. MARK W. MATKOVICH (TAX COMM)

DATE	ACTION
	* * *
11/30/2015	PETITIONERS' BRIEF FILED: BY PT BRIEF
	* * *
01/11/2016	TAX DEPARTMENT'S BRIEF OPPOSING PETITION FOR APPEAL, BY JJ BRIEF
01/25/2016	PETITIONER'S REPLY BRIEF
03/24/2016	TRANSCRIPT OF PROCEEDINGS ON 03/14/2016 BEFORE JUDGE SADLER, PLACED IN COURT FILE: BY PT TRANSCRIPT
04/01/2016	ORDER GRANTING APPEAL & REVERSING THE DECISION OF THE WEST VIRGINIA OFFICE OF TAX APPEALS
	* * *

THE FOREGOING IS A TRUE COPY OF A DOCUMENT ENTERED IN THIS OFFICE ON THE 11 DAY OF JULY, 2016 DATED THIS 11 DAY OF JULY 2016

JULIE BALL, CLERK OF THE CIRCUIT COURT OF MERCER COUNTY WV

BY */s/ Jessica Jones*
HER DEPUTY

GENERAL DOCKET
BEFORE THE WEST VIRGINIA
OFFICE OF TAX APPEALS

DAWSON, JAMES D., and ELAINE F., Petitioners,	)	DOCKET NO. 14-026 RPD
v.	)	
MATKOVICH, MARK W., as ACTING STATE TAX COMMISSIONER of WEST VIRGINIA Respondent	)	

DATE	DESCRIPTION OF DOCUMENT OR PROCEEDING
	* * *
01/23/2015	Petitioners' Exhibits One (1) Through Fifteen (15)
01/23/2015	Respondent's Exhibits One (1) Through Seven (7)
01/23/2015	Transcript of 01/23/2015 Hearing and Sign-In Sheet for Hearing
	* * *
02/06/2015	Petitioners' Letter and First Brief
02/06/2015	Respondent's Letter and First Brief Opposing Refunds
	* * *

02/20/2015	Respondent's Letter and Final Brief Regarding Opposing Refunds
02/20/2015	Petitioners' Letter and Final Brief in Response to Respondent's Brief Opposing Refunds

* * *

08/07/2015	WVOTA Final Decision of 01/23/2015 Evidentiary Hearing

* * *

State of WEST VIRGINIA, County of Kanawha
This is to certify that this is a true and correct copy.
/s/ Stephen P. Lee
Stephen P. Lee, Executive Director

WV Office of Tax Appeals
Subscribed and sworn before me this 9th
Day of December, 2015.
/s/ Donna A. Dillon, Notary Public
My Commission Expires Sept. 13, 2022.
Donna A. Dillon

YOUR FEDERAL RETIREMENT BENEFITS

United States
Office of
Personnel
Management

Retirement and
Insurance Service

YOUR FEDERAL RETIREMENT BENEFITS

Dear JAMES DAWSON

This *personalized* booklet describes your monthly benefits, and provides other essential information. Review it carefully and keep it with your important papers and documents.

Federal employees play a valuable role in our country's workforce. We care for national parks, conduct research on treating and curing disease, and perform the important work of the American government. Our country needs and depends on us. Your years in the Federal Government have been significant in helping our nation grow and prosper. During your service in the Federal workforce, you have earned and accrued certain retirement benefits. Now that you have stepped away from active Federal employment, it is time to receive and enjoy these benefits.

The Office of Personnel Management (OPM) can help you make the transition to retirement. We are here to answer your questions and explain your retirement benefits in detail. Call us toll-free at 1-888-767-6738 (Retirees in the Washington, DC area should call 202-606-0500).

Our best wishes on a happy and healthy retirement. OPM looks forward to serving you in the years ahead.

Joseph E. Donald, Jr.
Assistant Director
Retirement Services Program
Office of Personnel Management

PERSONAL STATISTICS

This Explanation of Benefits was prepared as of June 18, 2008

Name: JAMES D. DAWSON

Civil Service Annuity (CSA) Number: CSA 8 373329 0

Retirement System: FERS

Beginning Date of Benefits: 04/01/2008

Current Correspondence Address:

JAMES D DAWSON
134 COTTONWOOD COURT
PRINCETON WV 24740

Personal Identification Number (PIN):

Direct Deposit: Type of Account;
Account Number

The amounts shown in this booklet are based upon employment records on file with us as of June 18, 2008 and your retirement application. If you believe any of this information is incorrect, please contact us at once. See the chapter "How to Contact Us" in this booklet for instructions. Please keep this with your personal records for future reference.

* * *

YOUR MONTHLY BENEFIT

Monthly Benefit

Your benefits began: April 1, 2008

Date of first regular monthly payment: July 1, 2008

Your initial gross monthly retirement benefits is: $3,926.00

Your retirement benefit is payable on the first business day of each month. Each monthly payment represents benefits for the prior month (e.g., the July 1, 2008 payment is for the mouth of June).

Your FERS Annuity Supplement

Because you retired under FERS but are not yet eligible for Social Security retirement benefits, you will receive a FERS Annuity Supplement of $801.00, in addition to your monthly annuity benefit shown above. The Benefit Supplement may continue until you become eligible for Social Security, generally at age 62, subject to data provided in the annual Annuity Supplement Survey.

Monthly Additions And Deductions

The net amount of your first regular payment: $3,896.58

If the net amount ever changes for any reason, we will send you a Notice of Annuity Adjustment explaining the change.

Current Cross Monthly Benefit	$3,926.00
Less:/Plus:	
Health Insurance Premium	-314.47
Family Life Insurance	-9.75
Standard Optional Life insurance	-3.03
Federal Income Tax	-456.69
Basic Life Insurance	-46.48
FERS Benefit Supplement	+801.00
Net Monthly Benefit	$3,896.58

See Retroactive Benefits Explanation for adjustment payment information.

Please note that although your retirement benefit provides for survivor benefits, (see Survivor Benefits chapter), you will not see separate monthly deductions for that coverage. Instead, the cost of the survivor benefit was factored into the computation of year gross monthly benefit shown above.

YOUR BENEFIT COMPUTATION

Many factors go into the computation of your monthly benefit. The following information summarizes the major components of your benefit computation.

Type Of Computation

You received the special computation given to eligible firefighters and law enforcement officers.

Average Salary

The "high-3" average salary in your case is: **$134,224.00**

Your benefit is based, in part, on the highest average salary during any three year period while you were employed. This three year period does not always occur in the last three years of employment. We have ensured that the average salary we computed is the highest average applicable to your salary history.

Length Of Service

Your benefit is also based, in part, on the amount of Federal service you performed as an employee. Your retirement records showed the following:

Military service included in total:	04 Years, 00 Months
Total Federal Service:	25 Years, 00 Months

Only years and full months are used in the computation; partial months are not counted.

Other Significant Factors

We credited your payment of $1,097.48 to cover your military service performed after December 31, 1956. Your payment amount is included in the retirement contributions shown in the Contributions and Tax Information chapter. That payment will permit you to continue to receive credit for all of your military service after you become eligible for Social Security benefits.

SURVIVOR BENEFITS

In the event of your death, your survivors should call our Retirement Information Office at **(1-888) 767-6738**. Customers within the local **Washington, DC**, calling area must call **(202) 606-0500**.

You elected to provide survivor benefits as follows based upon the **full amount** of the annuity. As noted on your retirement application, you may change your election by filing a new election in writing **not later than** 30 days after the date of your first regular monthly payment.

The redaction to provide survivor benefits is made from your basic annual annuity at retirement. There are no separate monthly deductions for providing survivor annuities.

Surviving Spouse

Name: ELAINE F

Surviving Children

Any dependent, unmarried children under age 18 (or disabled children over 18 if disabled prior to age 18, or

full-time students under age 22) could be eligible for a survivor annuity.

Cost-of-living increases to your annuity will increase the value of your survivor benefits.

HEALTH INSURANCE BENEFITS

Your Federal Employees Health Benefits coverage is described below:

Your Plan name:	BLUE CROSS BLUE SHIELD Self-And-Family
Enrollment code:	105
Your cost each month:	314.47
Government share:	713.48
Total cost:	1,027.95

Other Information
Self and Family

You are enrolled under a Self and Family plan. You may change to Self Only at any time. However, if you switch to Self Only, you can only change back to Self and Family under Special circumstances such as: the birth or adoption of a child, a change to marital status, or an open season. Family members who lose coverage under your plan (i.e., a non-disabled, dependent child who reaches age 22) may qualify for Temporary Continuation of Coverage (TCC) for up to 36 months, Under TCC, the covered Individual must pay the full cost of coverage (individual and government share), plus an administrative fee of 2%.

Medicare

For retirees, Medicare is the primary health benefits provider for most eligible individuals age 65 and over. When you reach age 65, you should contact your local

Social Security office or call the toll-free number under "Other Useful Numbers" in the chapter on "How To Contact OPM" to obtain Medicare information.

Health Benefits Open Season

Once a year, we hold a Health Benefits Open Season during which you can change plans, or switch from Self Only to Self and Family. We will provide information prior to the beginning of Open Season.

LIFE INSURANCE BENEFITS

Your life insurance coverage under the Federal Employees' Group Life Insurance Program, is based on your coverage at the time of separation, your final salary, and elections at retirement. You cannot carry any coverage into retirement that you have not had continuously since your earliest opportunity to elect, or for 5 years immediately preceding retirement, whichever is shorter.

Basic Life Insurance – Your Basic Life insurance amount at retirement is $143,000. This is the result of taking your final salary, rounded to the next thousand (if it is not an even thousand), and adding $2,000.

You elected a 75% reduction schedule for your Basic Life insurance. This means the amount payable on your Basie Life insurance begins to reduce by 2 percent of the original amount per month beginning the second month after you attain age 65, until it reaches 25% office value. Your cost for this coverage reduces to zero at age 65.

Standard Life Insurance (Option A) – Your Standard Life insurance amount at retirement is $10,000. This is the normal amount for this type of

coverage. The amount payable, on your Standard Life insurance will begin, to reduce by 2 percent per month of the original amount beginning the second month after you attain age 65, until it reaches $2,500. Your cost for this coverage reduces to zero at age 65.

Family Life Insurance (Option C) – Your Family Life insurance amounts at retirement are $25,000 of coverage for your spouse and $12,500 for cadi eligible child. This is the result of taking the minimum amounts ($5,000 and $2,500, respectively), and multiplying by the number of multiples (5) you carried into retirement.

Because you directed No Reduction for your Option C coverage, the amount payable on your Family Life Insurance will not reduce throughout your retirement. Premiums will continue for life, unless you cancel coverage or switch to a Full Reduction Schedule. No premiums will be refunded if you change your reduction schedule or cancel your insurance.

Approximately three months before your 65th birthday (or shortly after retirement if you are already 65 or older), we will send you a letter reminding you that you can change your Option B and/or Option C reduction election. At that time, if you have more than one multiple, you may elect No Reduction for some multiples and Full Reduction for others.

The monthly costs of Optional coverage for a retiree vary with age, as follows (effective January 1, 2005), and are subject to change in the future:

	Option A (10.000)	Option B (per $1,000)	Option C (per multiple)
Under 35	$.65	$.065	$.59
35 - 39	$.87	$.087	$.74
40 - 44	$1.30	$.130	$1.00
45 - 49	$1.95	$.195	$1.30
50 - 54	$3.03	$.303	$1.95
55 - 59	$5.85	$.607	$3.14
60 - 64	$13.00	$1,300	$5.63
65 - 69	$ 0	$1,560*	$6.50*
70 - 74	$ 0	$2,600*	$7.37*
75 - 79	$ 0	$3,900*	$9.75*
80+	$ 0	$5,200*	$13.00*

* These are the rates for No Reduction. Optional coverage is free as of the month after you turn age 65, or the date of retirement if you are already 65 or older when you retire, unless you elect No Reduction for Option B or Option C.

Living Benefits

If you become afflicted with a terminal illness (prognosis 9 months or less to live), you may apply for and receive a Living Benefit payment equal to what your Basic life insurance amount will be 9 months after the date the Office of Federal Employees' Group Life insurance receives your application, reduced by a nominal amount to make up for lost earnings to the Life Insurance Fund. Once you receive a Living Benefit payment and cash or deposit the check, the election is irrevocable. A Living Benefit election has no effect on any Optional coverage held. If you assign your life insurance prior to receiving a Living Benefit,

neither you nor the assignee may elect a Living Benefit.

Assignment

You may assign your life insurance at any time. Assignment means you transfer ownership of your life insurance to someone else, but you continue to be responsible for payment of premiums. An assignment applies to all coverages held (Basic and Options), except Option C, Family, which cannot be assigned. Once you assign your life insurance, you give up the right to designate a beneficiary, or to reduce, cancel or convert your coverage (except for the initial Reduction Schedule election, which you still get to make at retirement). Also, if you assign your life insurance, neither you nor the assignee may then apply for or receive a Living Benefit based on your coverage.

Other Information

Unless you assign your life insurance, you can cancel all of your coverage, or any one of the Options (A, B or C), or reduce the number of multiples under Additional or Family (Options B or C) at any time. Any cancellation or reduction must be in writing, and is irreversible once in effect. If you cancel Basic, any Optional coverage you have is also canceled. You cannot increase your coverage after retirement, or reinstate any coverage previously cancelled. If you elected 50% Reduction or No Reduction, you can change to 75% Reduction, but not the other way around (you also cannot switch from No Reduction to 50% Reduction, or the other way around). Also, the Accidental Death and Dismemberment coverage you had automatically as an employee ended at retirement.

CONTRIBUTIONS AND TAX INFORMATION

Your Retirement Contributions

The amount of retirement contributions to your credit is $ 21.646.00. This amount includes the deposit made to cover military service after December 31, 1956.

If the total amount of retirement benefits paid to you (and any survivors eligible for monthly benefits) is less than the amount of your retirement contributions plus any applicable interest, the difference will be paid to your survivors or estate as a lump sum. Once you (and any survivors receiving monthly benefits) receive gross monthly benefits that exceed your contributions, there are no more contributions in your account, and no lump sum payment is made. You continue, however, to receive your monthly annuity even when your benefits paid exceed your contributions.

Recovering an amount equal, to your retirement contributions for tax purposes is treated differently, and is discussed on the following page.

Federal Income Tax

Your retirement benefit is subject to Federal income tax.

Because you already paid Federal income tax on your retirement contributions, you are entitled to receive an amount equal to those contributions as tax-free income. Under the IRS Simplified General Rule, a portion of each monthly payment is tax-free, and, represents the recovery of your previously taxed contributions. The remaining portion of each monthly payment is fully taxable. You continue to claim this tax-free amount until the total tax-free amounts

claimed equal your retirement contributions. At that time, all of your Benefit becomes taxable.

Under the Simplified General Rule, $52.80 of each monthly payment is tax-free. You can claim this monthly tax-free amount until the total tax-free benefit claimed equals your retirement contributions.

Federal Income Tax Withholding

Your retirement benefit is subject to Federal income tax withholding.

We are withholding Federal income tax at the rate applicable to a married individual claiming 2 withholding allowances. This withholding rate results in a monthly deduction of $456.69.

You can start, stop, or change your Federal income tax withholding at any time by calling our automated telephone system. See chapter on "How To Contact OPM" for detailed instructions.

Useful IRS Publications

You may find the following IRS Federal income tax publication useful in answering your Federal lax questions:

IRS Publication 721 Tax Guide to U.S. Civil Service Retirement Benefits

To ask for this and other publications, you can call the IRS at 1-800-829-3676.

State Income Tax

We cannot provide specific information on the tax treatment of your retirement benefits for state tax purposes. You should contact your state tax office for further assistance.

We can, however, withhold West Virginia income tax from your retirement benefit. You will need to provide us with the specific dollar amount you want withheld each month. To start, stop, or change your state income tax withholding, call our toll-free automated telephone line at 1-888-767-6738. See chapter on "How To Contact OPM" for detailed instructions.

RETROACTIVE BENEFITS EXPLANATION

Adjustment Payment Information

You are due a net retroactive payment of $2,752.07.

That amount represents the difference between the interim payments already made to you, and the full amount you were due. The following explains the computation of this adjustment payment.

Gross Benefits due from 04/01/2008 through 05/31/2008:	$7,852.00
Less:/Plus:	
Health Insurance Premium	-$628.94
Gross Interim Pay	-$5,144.00
Family Life Insurance	-$19.50
Standard Optional Life Insurance	-$6.06
Federal Income Tax	-$810.47
Basic Life Insurance	-$92.96
FHRS Benefit Supplement	+$1,602.00
Net adjustment due you	$2,752.07

A direct deposit payment in that amount has been, sent to your financial institution.

HOW TO CONTACT OPM

Contacting Us On The Internet

Our email address is: retire@opm.gov

Our website is www.opm.gov/retire

We provide benefit information and assistance on our web site 24 hours a day, 365 days a year. You will find retirement brochures, forms, and other information at this site.

You can take the following actions over the internet at our web site. You will need your civil service annuity (CSA) claim number and the Personal Identification Number (PIN) which we will send shorty.

*View a statement describing your annuity payment;

*Change your correspondence address;

*Start, stop, or change your Federal and state income tax withholding;

*Request a duplicate tax-filing statement (1099R);

*Change your PIN number;

*Report a lost or missing payment;

*Sign up for direct deposit, or change where your payment is sent;

*Sign up for, change or stop a U.S. Savings Bond allotment, or;

*Make a health benefits open season change.

Please be sure to write your PIN in the space provided on Page 2 of this booklet when you receive it so you will have it when you need it.

Changes By Telephone

You can also make most of the changes listed above over the telephone. When you call us at the number(s) shown on the following page, you will be greeted by an automatic answering system which will guide you

through a menu listing the topics our customers call about most frequently.

Calling About Your Benefits

You may call our
Retirement Information Office at:

1-88 US OPM RET
(1-888-787-6738) or
1-800-878-5707(TDD)*

Customers within the Washington, DC,
calling area must call: **(202) 606-0500 or**
(202) 606-0551 TDD)*

We are committed to providing you with the best customer service possible. Please have your Civil Service annuity (CSA) claim number available when you call.

*Telecommunications Device for the Deaf

Using The Automated System

To use the telephone system's automated features, you will need your Civil Service Annuity (CSA) claim number and Personal Identification Number (PIN). Although the automated system is available to you, you have the option of talking to a Customer Service Specialist.

If you call on a rotary telephone, you will not be able to use the automated features. However, you can stay on the line, and your call will be sent to a Customer Service Specialist. The automated system is available seven days a week. Customer Service Specialists are available from 7:30 am to 7:45 pm Eastern time, Monday through Friday. They are not available on Federal holidays.

Contact Us In Writing

We are arranging to handle more and more retirement business based on telephone calls from our customers. This is because there are many things you can do for yourself without assistance. More importantly, most of the business you will ever need to conduct with us can be done by telephone without the need to write.

If you need to write, our mailing address for general correspondence is:

U.S. Office of Personal Management
Retirement Operations Center
Post Office Box 45
Boyen, PA 16017-0045

Visiting Us In Person

You are also welcome to visit us in person. Our Retirement Information Office is located at:

U.S. Office of Personnel Management
Central Retirement Information Office
Room E323
1900 E Street NW
Washington, DC 20415

You will need to bring some form of identification to enter the building.

Other Useful Telephone Numbers

In addition to contacting OPM, you may also need to contact the following Federal agendas and programs:

Thrift Savings Plan: 1-877-968-3778 (Thrift line & Information)
1-877-847-4385 (TDD)
1-404-233-4400 (International not toll free)

Social Security Administration:	1-800-772-1213
	1-800-325-0778 (TDD)
Centers for Medicare and Medicaid Services (formerly HCFA):	1-800-633-4227 (MEDICAR)
Internal Revenue Service:	1-800-829-1040 (General Tax)
	1-800-829-3676 (Publications and Forms)
Federal Long Term Care Insurance Program (FLTCIP)	1-800-582-3337 1-800-843-3557 (TDD)
www.LTCFEDS.com	Call or visit the website to find out if you're eligible to apply for this insurance, or if you have questions about existing coverage.

COST OF LIVING, ADJUSTMENTS AND NOTICES

COLA Increases

We will periodically increase your annuity based on Cost of Living Adjustments (COLA's) provided by law. Shortly before you receive your new payment amount, we will send you a Notice of Annuity Adjustment showing the payment change.

The first COLA you receive will be prorated based on how many months you were retired during the period covered by the COLA. If you receive a prorated COLA, we will tell you at that time what portion you received. You will then be eligible for the full amount of any subsequent COLA.

Future Check Adjustments

As your various monthly deductions change for any reason, we will send you a Notice of Annuity Adjustment explaining the change.

Your health insurance premium can change each year, effective January 1. Any change to premiums will appear in your February 1 payment, which represents your annuity and insurance premium deduction for the month of January.

If your spouse dies before you do, we will recompute your annuity to eliminate the reduction we made to provide for the survivor benefit. You should contact us if this is necessary.

The premiums you pay for your life insurance depend on your age. The premiums we have already described will continue until you turn age 55.

Other OPM Notices

Each October, we will send you information about the upcoming Health Insurance Open Season (see Health Benefits chapter). That material will explain what kind of changes you can make in your coverage, what your new premiums will be, and if you do make a change in coverage, we will send you a confirmation that the change has been made.

By the end of each January, we will send you a form 1099R, Statement of Annuity Paid. This statement will report how much you received form OPM, any Federal and state taxes withheld, and should be used to file your tax return(s). If you do not receive the statement, please call our Retirement Information Office at **1-888-767-6738**. Customers within the

Washington, DC, calling area, must call **(202) 606-0500**.

Each time we update your address (either your direct deposit information, or your correspondence address), we will send you a confirmation of that change and let you know which will be the first payment to go to the new address, if applicable.

We have recently sent you an Identification Card, to keep as a permanent record of your retirement claim number.

PAMPHLETS AVAILABLE

These are some of the pamphlets and forms available by calling OPM:

RI 38-126	Life Events And Your Retirement And Insurance Benefits
RI 84-1	Court Ordered Benefits For Former Spouses
RI 90-8	Information For FERS Annuitants
RI 90-16	Applying For Death Benefits
SF 3102	Designation Of Beneficiary - FERS
RI 90-12	Information For FERS Survivor Annuitants
RI 70-9	FEHB Enrollment Guide - CSRS & FERS Annuitants
RI 79-2	FEHB Information For Retirees and Survivor Annuitants
RI 79-27	Temporary Continuation of Coverage Under FEHB
FE6	FEGLI Claim For Death Benefits
RI 76-10	Assignments Of Life Insurance

RI 76-12	Information For Retirees About FEGLI
RI 76-14	Cancellation Of Family Optional Life Insurance
SF 2823	Designation Of Beneficiary - FEGLI
FE6 DEP	Statement Of Claim - Option C - Family Life Insurance

KEEPING YOUR ADDRESS UPDATED

JAMES D DAWSON
134 COTTONWOOD COURT
PRINCETON WV 24740

It is very important that you keep your correspondence address up-to-date, We will be sending a wide variety of important information to you, and it is important that you let us know each time your correspondence address changes.

Although your payments will be sent by direct deposit to your financial institution, we will send all other material to you at the address shown above.

Providing your new address to us is easy. Just call our Retirement Information Office at 1-888-767-6738 (202-606-0500, Washington, DC area). We will be happy to take the information over the phone.

IN THE WEST VIRGINIA OFFICE OF TAX APPEALS

JAMES D. and ELAINE F. DAWSON,

Petitoners,

v.

OTA DOCKET No. 14-026 RPD

MARK W. MATKOVICH, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

STATE TAX DEPARTMENT'S EXHIBIT 1

STATE OF WEST VIRGINIA RETIREMENT PLANS

As of 7/1/2010	Public Employees (PERS)	Teachers' Defined Benefit (TRS)	Teachers' Defined Contribution (TDC)	State Police (Plan A)	State Police (Plan B)	Judges' System (JRS)	Deputy Sheriffs' (DSRS)	Emergency Medical Services (EMSRS)	Municipal Police & Firefighters (MPFRS)
Year implemented	1961	1941	1991	1935	1994	1949	1998	2008	2010
Active Members	35,977	35,670	4,778	147	498	71	958	525	6
Retirees	22,040	30,127	N/A	684	17	56	260	0	0
Covered by Soc Sec.	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Unknown
Out of State. Svc. Credit	Yes	Yes	No	No	No	No	No	No	No
% of Employee Contributions	12.50%	Per Actuary (NC+ UAAL) 29.2% TRS Pay FY 2011	7.50%	Per Actuary (NC+ UAAL) above 15% Statutory (248.2% FY 2011)	19.5% of Base Pay	Per Actuary (NC + UAAL) 37.9% pay FY 2011	10.50% plus Fee Deposits (1.34% fees FY 2011)	10.50%	8.50%
% of Employee Contributions	4.50%	6.00%	4.50%	9.00%	13% of Base Pay	10.50%	8.50%	8.50%	8.50%

As of 7/1/2010	Public Employees (PERS)	Teachers' Defined Benefit (TRS)	Teachers' Defined Contribution (TDC)	State Police (Plan A)	State Police (Plan B)	Judges' System (JRS)	Deputy Sheriffs' (DSRS)	Emergency Medical Services (EMSRS)	Municipal Police & Firefighters (MPFRS)
Unfunded Accrued Liability (UAL)	$1,351,221,000	$4,760,772,000	N/A	$186,285,000	$16,436,000	($6,806,000)	$46,946,000	$7,841,000	$717
% Funded	74.6%	46.5%	100%	68.5%	76.2%	107.1%	66.4%	75.1%	79.7%
Normal Retirement	Age 60 and 5 Years of Service or Age 55 and Age plus Service equals 80	Age 60 and 5 Years of Service or Age 55 and 30 Years or Any Age and 35 Years	Age 55 and 12 Years of Service for Full Benefits	25 Years of Service or Age 50 and 20 Years or Age 62 and 10 Years	Age 50 and 25 Years of Service or Age 52 and 20 Years or Age 62 and 10 Years	24 Years of Service or Age 65 and 16 Years	Age 50 with 20 Years of Service or Age 60 with 5 Years	Age 50 and Age plus Service equals 70 or Age 60 and 10 Years or Age 62 and 5 Years	Age 50 and Age plus Service equals 70 Points or Age 60 and 10 Years or Age 62 and 5 Yrs.
Retirement Benefits	(2.0% of FAS) x (Years of Service) / FAS = 36 highest consecutive months out of last 10 years of earnings	(2.0% of FAS) x (Years of Service) / FAS = 5 highest out of last 15 years of earnings	Vested Funds in Both EE & ER Contributions plus Net Earnings / Vesting: ⅓ at 6 years ⅓ at 9 years	5.5% of Total Salary during Maximum of 25 Years of Service	(2.75% of FAS) x (Years of Service) / FAS = 5 highest calendar years out of last 10	Judges on bench on/or before 7-1-05 75% of Current Salary of Sitting Judges	(2.25% of FAS) x (Yeats of Service) / FAS = 5 highest consecutive plan years out of last 10	2.75% of FAS for 1-20 years of svc. - 2.0% of FAS for 21-25 years of svc. 1.0% of FAS for 26-30 years of svc.	2.6% of FAS for 1-20 years of svc. 2.0% of FAS for 1 21-25 years of svc. 1.0% of FAS V H 26-30 years of svc.

As of 7/1/2010	Public Employees (PERS)	Teachers' Defined Benefit (TRS)	Teachers' Defined Contribution (TDC)	State Police (Plan A)	State Police (Plan B)	Judges' System (JRS)	Deputy Sheriffs' (DSRS)	Emergency Medical Services (EMSRS)	Municipal Police & Firefighters (MPFRS)
			100% at 12 years		years of earnings	Judges on bench after 7-1-05 75% of FAS FAS=3 highest yrs	years of earnings	FAS = 3 highest consecutive plan years out of last 10 years of earnings	FAS = 3 highest consecutive plan years out of last 10 years of earnings
COLA	No	No	No	3.75%	1.0%	No	No	No	No
Credit for Military Service	Yes - After 5 Years of Service - Credit for up to 5 Years	Yes - Up to 25% of Total Service with Maximum 10 Years	Service under USERRA only	Yes - Credit for up to 5 Years after 20 Years of Service	Yes- Credit for up to 5 Years after 20 Years of Service	Yes - Credit for up to 5 Years	Yes - After 5 Years of Service - Credit up to 5 Years	Yes - After 5 Years of Service - Credit up to 5 Years	Yes - After 5 Years of Service- Credit up to 2 Years
Disability Benefits	Yes - After 10 Yrs. Of Svc. for Non-Work Related Disability	Any Age & 10 Years of Svc. or 5 Years of Svc. for Student Violence	Yes - No Minimum Service	Any Age & Any Service	Any Age & Any Service	Yes - After 10 Years of Service or Age 65 with 6 yrs	Any Age & Any Service	Any Age & Any Service	Any Age & Any Service
Interest Rate Assumption	7.5%	7.5%	N/A	7.5%	7.5%	7.5%	7.5%	7.5%	7.5%

As of 7/1/2010	Public Employees (PERS)	Teachers' Defined Benefit (TRS)	Teachers' Defined Contribution (TDC)	State Police (Plan A)	State Police (Plan B)	Judges' System (JRS)	Deputy Sheriffs' (DSRS)	Emergency Medical Services (EMSRS)	Municipal Police & Firefighters (MPFRS)
Projected Amortisation	by 6/30/2035	by 6/30/2034	N/A	by 6/30/2025	by 6/30/2030	N/A	by 6/30/2029	by 6/30/2038	by 6/30/2040

IN THE WEST VIRGINIA OFFICE OF TAX APPEALS

JAMES D. and ELAINE F. DAWSON,

Petitoners,

v.

OTA DOCKET No. 14-026 RPD

MARK W. MATKOVICH, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

STATE TAX DEPARTMENT'S EXHIBIT 2

CONSOLIDATED PUBLIC RETIREMENT BOARD (CPRB) PLAN STATISTICS

As of 7/1/2011	Public Employees (PERS)	Teachers' Defined Benefit (TRS)	Teachers' Defined Contribution (TDC)	State Police (Plan A)	State Police (Plan B)	Judges' System (JRS)	Deputy Sheriffs' (DSRS)	Emergency Medical Services (EMSRS)	Municipal Police & Firefighters (MPFRS)
Year Implemented	1961	1941	1991	1935	1994	1949	1998	2008	2010
Active Members	36,254	35,855	4,554	133	523	70	954	535	9
Retirees	22,793	31,043	N/A	689	17	56	272	20	0
Covered by Soc. Sec.	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Unknown
Out of State Svc. Credit	Yes	Yes	No	No	No	No	No	No	No
% of Employer Contributions	14.5%	Per Actuary (NC+ UAAL) 27.66% TRS Pay FY 2012	7.50%	Per Actuary (NC+ UAAL) above 15% Statutory (247.4 % FY 2012)	17.5% of Base Pay	Per Actuary (NC + UAAL) 30.9% Pay FY 2012	13% plus Fee Deposits (1.30 % fees FY 2012)	10.50%	8.50%
% of Employee Contribution?	4.50%	6.00%	4.50%	9.00%	13% of Base Pay	10.50%	8.50%	8.50%	8.50%

As of 7/1/2011	Public Employees (PERS)	Teachers' Defined Benefit (TRS)	Teachers' Defined Contribution (TDC)	State Police (Plan A)	State Police (Plan B)	Judges' System (JRS)	Deputy Sheriffs' (DSRS)	Emergency Medical Services (EMSRS)	Municipal Police & Firefighters (MPFRS)
Unfunded Accrued Liability (UAL)	$1,192,584,000	$4,370,483,000	N/A	$124,251,000	$8,280,000	($28,992,000)	$35,888,000	$6,859,000	($42,000)
% Funded	78.4%	53.7%	100%	79.5%	89.5%	130.3%	76.0%	82.5%	282.6%
Normal Retirement	Age 60 and 5 Years of Service or Age 55 and Age plus Service equals 80	Age 60 and 5 Years of Service or Age 55 and 30 Years or Any Age and 35 Years	Age 55 and 12 Years of Service for Full Benefits	25 Years of Service or Age 50 and 20 Years or Age 62 and 10 Years	Age 50 and 25 Years of Service or Age 52 and 20 Years or Age 62 and 10 Years	24 Years of Service or Age 65 and 16 Years	Age 50 with 20 Years of Service or Age 60 with 5 Years	Age 50 and Age plus Service equals 70 or Age 60 and 10 Years or Age 52 and 5 Years	Age 50 and Age plus Service equals 70 Points or Age 60 and 10 Years or Age 62 and 5 Yrs.
Retirement Benefits	(2.0% of FAS) x (Years of Service) / FAS = 36 highest consecutive months out	(2.0% of FAS) x (Years of Service) / FAS = 5 highest out of last 15	Vested Funds in Both EE & ER Contributions plus Net Earnings / Vesting: ⅓ at	5.5% of Total Salary during Maximum of 25 Years of Service	(2.75% of FAS) x (Years of Service) / FAS = 5 highest calendar years out	Judges on bench on/or before 7-1-05 75% of Current Salary of Sitting Judges	(2.25% of FAS) x (Years of Service) / FAS = 5 highest consecutive plan years	2.75% of FAS for 1-20 years of svc. 2.0% of FAS for 21-25 years of svc. 1.0% of FAS for 26-30 years of svc.	2.6% of FAS for 1-20 years of svc. 2.0% of FAS for 21-25 years of svc. 1.0% of FAS for 26-30 years of svc.

As of 7/1/2011	Public Employees (PERS)	Teachers' Defined Benefit (TRS)	Teachers' Defined Contribution (TDC)	State Police (Plan A)	State Police (Plan B)	Judges' System (JRS)	Deputy Sheriffs' (DSRS)	Emergency Medical Services (EMSRS)	Municipal Police & Firefighters (MPFRS)
	of last 15 years of earnings	years of earnings	6 years ½ at 9 years 100% at 12 years		of last 10 years of earnings	Judges on bench after 7-1-05 75% of FAS FAS=3 highest yrs	out of last 10 years of earnings	FAS = 5 highest consecutive plan years out of last 10 years of earnings	FAS = 5 highest consecutive plan years out of last 10 years of earnings
COLA	No	No	No	3.75%	1.0%	No	No	No	No
Credit for Military Service	Yes - After 5 Years of Service - Credit for up to 5 Years	Yes-Up to 25% of Total Service with Maximum 10 Years	Service under USERRA only	Yes-Credit for up to 5 Years after 20 Years of Service	Yes-Credit for up to 5 Years after 20 Years of Service	Yes - Credit for up to 5 Years	Yes - After 5 Years of Service-Credit up to 5 Years	Yes - After 5 Years of Service - Credit up to 5 Years	Yes - After 5 Years of Service - Credit up to 2 Years
Disability Benefits	Yes-After 10 Yrs. Of Svc. for Non-Work	Any Age & 10 Years of Svc. or 5 Years of Svc. for	Yes No Minimum Service	Any Age & Any Service	Any Age & Any Service	Yes - After 10 Years of Service or	Any Age & Any Service	Any Age & Any Service	Any Age & Any Service

As of 7/1/2011	Public Employees (PERS)	Teachers' Defined Benefit (TRS)	Teachers' Defined Contribution (TDC)	State Police (Plan A)	State Police (Plan B)	Judges' System (JRS)	Deputy Sheriffs' (DSRS)	Emergency Medical Services (EMSRS)	Municipal Police & Firefighters (MPFRS)
	Related Disability	Student Violence				Age 65 with 6 yrs.			
Interest Rate Assumption	7.5%	7.5%	N/A	7.5%	7.5%	7.5%	7.5%	7.5%	7.5%
Projected Amortization	by 6/30/2035	by 6/30/2034	N/A	by 6/30/2025	by 6/30/2030	N/A	by 6/30/2029	by 6/30/2038	N/A

IN THE WEST VIRGINIA OFFICE OF TAX APPEALS

JAMES D. and ELAINE F. DAWSON,

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v.

OTA DOCKET No. 14-026 RPD

MARK W. MATKOVICH, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

STATE TAX DEPARTMENT'S EXHIBIT 3

CONSOLIDATED PUBLIC RETIREMENT BOARD (CPRB) PLAN STATISTICS

As of 7/1/2012	Public Employees (PERS)	Teachers' Defined Benefit (TRS)	Teachers' Defined Contribution (TDC)	State Police (Plan A)	State Police (Plan B)	Judges' System (JRS)	Deputy Sheriffs' (DSRS)	Emergency Medical Services (EMSRS)	Municipal Police & Firefighters (MPFRS)
Year Implemented	1961	1941	1991	1935	1994	1949	1998	2008	2010
Active Members	36,573	35,807	4,376	108	566	70	979	494	27
Retirees	23,460	31,913	69	710	18	55	283	34	0
Covered by Soc. Sec.	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Unknown
Out of State Svc. Credit	Yes	Yes	No	No	No	No	No	No	No
% of Employer Contributions	14.0%	Per Actuary (NC+ UAAL) 26.79% TRS Pay FY 2013	7.50%	Per Actuary (NC+ UAAL) above 15% Statutory (177.7% FY 2013)	15.5% of Base Pay	Per Actuary (NC + UAAL) 27.3% Pay FY 2013	13% plus Fee Deposits (1.26% fees FY 2013)	10.50%	8.50%
% of Employee Contribution?	4.50%	6.00%	4.50%	9.00%	13% of Base Pay	10.50%	8.50%	8.50%	8.50%

As of 7/1/2012	Public Employees (PERS)	Teachers' Defined Benefit (TRS)	Teachers' Defined Contribution (TDC)	State Police (Plan A)	State Police (Plan B)	Judges' System (JRS)	Deputy Sheriffs' (DSRS)	Emergency Medical Services (EMSRS)	Municipal Police & Firefighters (MPFRS)
Unfunded Accrued Liability (UAL)	1,283,380,000	4,568,185,000	N/A	185,996,000	10,823,000	(28,150,000)	39,481,000	8,665,000	(112,000)
% Funded	77.6%	53.0%	100%	72.0%	87.9%	128.7%	74.9%	80.4%	224.4%
Normal Retirement	Age 60 and 5 Years of Service or Age 55 and Age plus Service equals 80	Age 60 and 5 Years of Service or Age 55 and 30 Years or Any Age and 35 Years	Age 55 and 12 Years of Service for Full Benefits	25 Years of Service or Age 50 and 20 Years or Age 62 and 10 Years	Age 50 and 25 Years of Service or Age 52 and 20 Years or Age 62 and 10 Years	24 Years of Service or Age 65 and 16 Years	Age 50 and Age plus Service	Age 50 and Age plus Service equals 70 or Age 60 and 10 Years or Age 52 and 5 Years	Age 50 and Age plus Service equals 70 Paints or Age 60 and 10 Years or Age 62 and 5 Yrs.
Retirement Benefits	(2.0% of FAS) x (Years of Service) / FAS = 36 highest consecutive months out	(2.0% of FAS) x (Years of Service) / FAS = 5 highest out of last 15	Vested Assets in Both EE & ER Contributions plus Net Earnings Thereon	5.5% of Total Salary during Maximum of 25 Years of Service	(2 75% of FAS) x (Years of Service) / FAS = 5 highest calendar years out	Judges on bench on/or before 7-1-05 75% of Current Salary of Sitting Judges	(2.25% of FAS) x (Years of Service) / FAS = 5 highest consecutive plan years	2.75% of FAS for 1-20 years of svc. 2.0% of FAS for 21-25 years of svc. 1.0% of FAS for 26-30 years of svc.	2.6% of FAS for 1-20 years of svc. 2.0% of FAS for 21-25 years of svc. 1.0% of FAS for 26-30 years of svc.

As of 7/1/2012	Public Employees (PERS)	Teachers' Defined Benefit (TRS)	Teachers' Defined Contribution (TDC)	State Police (Plan A)	State Police (Plan B)	Judges' System (JRS)	Deputy Sheriffs' (DSRS)	Emergency Medical Services (EMSRS)	Municipal Police & Firefighters (MPFRS)
	of last 15 years of earnings	years of earnings	Vesting: 33.33% at 6 years 66.67% at 9 years 100% at 12 years		of last 10 years of earnings	——— Judges on bench after 7-1-05 75% of FAS FAS=3 highest yrs	out of last 10 years of earnings	——— FAS = 5 highest consecutive plan years out of last 10 years of earnings	——— FAS = 5 highest consecutive plan years out of last 10 years of earnings
COLA	No	No	No	3.75%	1.0%	No	No	No	No
Credit for Military Service	Yes – Credit for up to 5 Years after 5 Years of Service	Yes-Up to 25% of Total Service with Maximum 10 Years	Service under USERRA only	Yes-Credit for up to 5 Years after 20 Years of Service	Yes-Credit for up to 5 Years after 20 Years of Service	Yes - Credit for up to 5 Years	Yes – Credit for up to 5 Years after 5 Years of Service	Yes – Credit for up to 5 Years after 5 Years of Service	Yes – Credit for up to 2 Years after 5 Years of Service
Disability Benefits	Yes-After 10 Yrs. Of Svc. for Non-Work	Any Age & 10 Years of Svc. or 5 Years of Svc. for	Yes No Minimum Service	Any Age & Any Service	Any Age & Any Service	Yes - After 10 Years of Service or	Any Age & Any Service	Any Age & Any Service	Any Age & Any Service

As of 7/1/2012	Public Employees (PERS)	Teachers' Defined Benefit (TRS)	Teachers' Defined Contribution (TDC)	State Police (Plan A)	State Police (Plan B)	Judges' System (JRS)	Deputy Sheriffs' (DSRS)	Emergency Medical Services (EMSRS)	Municipal Police & Firefighters (MPFRS)
	Related Disability	Student Violence				Age 65 with 6 yrs.			
Interest Rate Assumption	7.5%	7.5%	N/A	7.5%	7.5%	7.5%	7.5%	7.5%	7.5%
Projected Amortization	by 6/30/2035	by 6/30/2034	N/A	by 6/30/2025	by 6/30/2030	N/A	by 6/30/2029	by 6/30/2038	N/A

West Virginia

Consolidated Public Retirement Board

Serving Those Who Serve West Virginia

Annual Report For:
Fiscal Year Ending June 30, 2010
and
Fiscal Year Ending June 30, 2011

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Plan Provisions

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PUBLIC EMPLOYEES RETIREMENT SYSTEM (PERS)

SUMMARY OF PLAN PROVISIONS 2010 / 2011

MEMBERSHIP The Public Employees Retirement System (PERS) was established on July 1, 1961 for the purpose of providing retirement benefits for employees of the State and other participating political sub-divisions. PERS is funded by employee and employer contributions.

ELIGIBILITY FOR RETIREMENT BENEFITS

Age	Years of Service	Benefit
55 and actively employed	Rule of 80 = Age plus contributing service equals 80 or more.	Full Benefits
60 and actively employed	5 or more years of contributing service	Full Benefits
55 and actively employed	10 or more years of credited service	Reduced Benefits
62 and not actively employed	If a member prior to July 1, 2002, 5 or more years of credited service (may include military); if a member on or after July 1, 2002, 5 or more years of contributory	Full Benefits

	service (military may not be included)	
55 and not actively employed	**Rule of 80 = Age plus contributing service equals 80 or more.**	**Full Benefits**
55 and not actively employed	**Between 20 and 24 years of service**	**Reduced Benefits**
Less than 55	**30 or more years of credited service**	**Reduced Benefits**

BENEFIT FORMULA

Final Average Salary x Years of Service x 2%

Final Average Salary is the average annual salary from the highest 36 consecutive months within the last 10 years of employment. Effective June 6, 2011 Final Average Salary is the average annual salary from the highest 36 consecutive months within the last 15 years of employment.

CONTRIBUTION RATES

An active member contributes 4.5% of his or her gross monthly salary to the plan. The employer contributes an additional 11.0% of the member's gross monthly salary for a total combined contribution equal to 15.5%. Current employee contributions are tax deferred. Contributions as a percentage of payroll for members and employers are established by the CPRB, and the employee contribution is subject to legislative limitations. The expected contributions are reviewed to assure that they result in actuarially sound funding for the plan.

11.0%	7/1/2009 – 6/30/2010
12.5%	7/1/2010 – 6/30/2011

INTEREST

Interest accrues at 4%.

ANNUITY OPTIONS

Option	Description
Straight Life	A lifetime annuity payable monthly to the retiree determined under the full benefit formula without adjustment. There are no death benefits under this option.
Option A – 100% Joint and Survivor	An actuarially reduced annuity payable monthly to retiree for his or her lifetime. At the member's death, the named survivor will receive

	the same amount for his or her lifetime.
Option B – 50% Joint and Survivor	An actuarially reduced annuity payable monthly to the retiree for his or her lifetime. At the retiree's death, the named survivor will receive one-half of the monthly payment for his or her lifetime.

DISABILITY BENEFITS

WORK RELATED DISABILITY – A member of PERS may apply for a work related total and permanent disability retirement with no minimum years of service required. He or she must be receiving (or have received) Workers' Compensation benefits on account of such disability.

NON-WORK RELATED DISABILITY – A member must have 10 or more years of credited service to apply for a non-work related total and permanent disability retirement.

Disability benefits shall not be less than 50% of a member's Final Average Salary. At age 65, the benefits are calculated on actual years of service, and may be reduced, but the straight life benefit may not be less than 20% of the member's Final Average Salary.

PRE-RETIREMENT DEATH BENEFITS

CATEGORY 1: LESS THAN 10: YEARS OF CREDITED SERVICE REGARDLESS OF ORIGINAL DATE OF HIRE OR MARITAL STATUS:

A member who has less than 10 years of credited service, regardless of marital status and regardless of original date of hire, may elect to name a beneficiary(ies) to receive a lump sum payment of his or her employee contributions plus 4% interest.

CATEGORY 2: HIRED FOR THE FIRST TIME BEFORE OR ON JUNE 9, 2006, HAS 10 OR MORE YEARS OF CREDITED SERVICE, AND IS MARRIED AT THE TIME OF DEATH:

A member of PERS who has 10 or more years of credited service, is married and was hired for the first time in PERS before or on June 9, 2006, may elect one of the following options on the Pre-Retirement Beneficiary form:

(A) The member may elect a 100% Joint and Survivor, calculated as if the member had retired the day preceding the date of his or her death, paid to his or her surviving spouse. The member may also elect to name an alternative beneficiary, who has an insurable interest in the life of the member, to receive the 100% Joint and Survivor annuity if the surviving spouse pre-deceases the member OR the member

may elect to name a beneficiary to receive a lump sum payment of his or her employee contributions plus 4% interest if the surviving spouse pre-deceases the member.

(B) If the "Spouse's Waiver of Survivorship Annuity" section is completed, the member may elect to have the 100% Joint and Survivor annuity, calculated as if the member had retired the day preceding the date of his or her death, paid to a named survivor who has an insurable interest in the life of the member OR the member may elect to name a beneficiary to receive a lump sum payment of his or her employee contributions phis 4% interest.

CATEGORY 3: HIRED FOR THE FIRST TIME BEFORE OR ON JUNE 9, 2016, HAS 10 OR MORE YEARS OF CREDITED SERVICE AND IS NOT MARRIED AT THE TIME OF DEATH:

A member of PERS who has 10 or more years of credited service, is not married and was hired for the first time in PERS before or on June 9, 2006, may elect one of the following options on the Pro-Retirement Beneficiary form:

(A) The member may elect to name a beneficiary(ies) to receive a lump sum payment of his or her employee contributions plus 4% interest.

(B) The member may elect to have a 100% Joint and Survivor annuity, calculated as if the member had retired the day preceding the date of his or her death, paid to a named survivor who has an insurable interest in the life of the member.

(C) The member may elect not to name a beneficiary and have his or her pre-retirement death benefit paid as a monthly annuity, calculated as though the member had retired as of the date of his or her death and elected a Straight Life annuity, to a minor child or children until the minor child or children attains age 21 or sooner marries or becomes emancipated.

In no event shall any child or children receive more than $250.00 per month.

CATEGORY 4: HIRED FOR THE FIRST TIME AFTER JUNE 9, 2006, HAS 10 OR MORE YEARS OF CREDITED SERVICE AND IS MARRIED AT THE TIME OF DEATH:

A member of PERS who has 10 or more years of credited service, is married and was hired after June 9, 2006, may elect one of the following options on the Pre-Retirement Beneficiary form:

(A) The member may elect a 100% Joint and Survivor annuity, calculated as if the member had retired the day preceding the date of his or her death, paid to his or her surviving spouse. The

member may also elect to name a beneficiary to receive a refund of his or her employee contributions plus 4% interest in the event the surviving spouse pre-deceases the member.

(B) If the "Spouse's Waiver of Survivorship Annuity" section is completed, the member may elect to have the 100% Joint and Survivor annuity, calculated as if the member had retired the day preceding the date of his or her death, paid to a child who is financially dependent upon the member by virtue of a permanent mental or physical disability, OR the member may elect to name a beneficiary to receive a lump sum payment of his or her employee contributions plus 4% interest.

**Evidence of disability must be provided and the disabled child must be named sole beneficiary.*

CATEGORY 5: HIRED FOR THE FIRST TIME AFTER JUNE 9, 2006, HAS 10 OR MORE YEARS OF CREDITED SERVICE AND IS NOT MARRIED AT THE TIME OF DEATH:

A member of PERS who has 10 or more years of credited service, is not married and was hired after June 9, 2006, may elect one of the following options on the Pre-Retirement Beneficiary form:

(A) The member may elect to name a beneficiary(ies) to receive a lump sum payment of his or her employee contributions plus 4% interest.

(B) The member may elect to have a 100% Joint and Survivor annuity, calculated as if the member had retired the day preceding the date of his or her death, paid to a child who is financially dependent upon the member by virtue of a permanent mental or physical disability.

Evidence of disability must be provided and the disabled child must be named sole beneficiary.

(C) The member may elect not to name a beneficiary and have his or her pre-retirement death benefit paid as a monthly annuity, calculated as though the member had retired as of the date of his or her death and elected a Straight Life annuity, to a minor child or children until the minor child or children attains age 21 or sooner marries or becomes emancipated.

In no event shall any child or children receive more than $250.00 per month.

TEACHERS' RETIREMENT SYSTEM (TRS)

SUMMARY OF PLAN PROVISIONS 2010 / 2011

MEMBERSHIP

The State Teachers' Retirement System (TRS) was established on July 1, 1941 for the purpose of providing retirement benefits for teachers and school service personnel of the State's 55 county public school systems, the State Department of Education, and the School for the Deaf and Blind. An active member contributes 6% of his or her gross monthly salary into the retirement plan. The employer contributes an additional 15% of the member's gross monthly salary into the plan for employees hired before July 1, 2005; 7.5% for employees hired for the first time on or after July 1, 2005 and for employees who transferred to TRS pursuant to WV Code §18-7D. Chapter 18, Article 7A of the West Virginia Code establishes the plan provisions for TRS.

ELIGIBILITY FOR RETIREMENT BENEFITS

Age	Years of Service	Benefit
55 and currently working	30 or more years of credited service	Full Benefits
Any age and	35 years of credited service	Full Benefits

currently working		
60 and currently working	**5 or more years of service**	**Full Benefits**
Less than 55 and currently working	**30 years of credited service**	**Reduced Benefit**
60 and not currently working	**20 or more years of service**	**Full Benefits**
62 and not currently working	**Less than 20 years of service**	**Full Benefits**

Members can retire with reduced benefits before age 55 after completing 30 years of credited service. An individual with 5 or more years of contributing service who terminates employment prior to retirement, but does not withdraw his or her employee contributions, will be eligible for retirement benefits at age 62, or at age 60 with 20 years of contributing service.

BENEFIT FORMULA — Final Average Salary x Years of Service x 2%

Final average salary refers to the average of the 5 highest years out of the last 15 years of contributing service.

LOANS

A member hired prior to July 1, 2005, may borrow up to 50% of his or her contributions, but the total existing loan may not exceed $8,000. Any outstanding loan balance must be paid in full before a member can receive retirement benefits or a member may elect to receive a lifetime actuarial reduction of their monthly retirement benefit to pay off their outstanding loan balance. Refinancing existing loans is not permitted. Loans are not available to members who are hired for the first time on or after July 1, 2005.

CONTRIBUTION RATES

TRS funding policy provides for member contributions based on 6% of members' annual compensation, tax deferred. Contributions as a percentage of payroll for members and employers are established by State law and are not actuarially determined. The employers make the following contributions:

The State, county boards of education and other employers contribute 15% of gross salary of their TRS covered employees hired prior to July 1, 1991.

The State, county boards of education and other employers contribute 7.5% of gross salary of TRS covered employees hired for the first time on or after July 1, 2005, and for those TDC members who selected to transfer to TRS effective July 1, 2008. The other employers and county boards of education, utilizing funds made available through the State's School Aid Formula (SAF), also contribute 7.5% of the gross salary of their TDC covered employees. In addition, the State contributes a certain percentage of fire insurance premiums paid by the State residents and an amount determined by the State actuary as being needed to extinguish the TRS unfunded liability within 40 years as of June 30, 1994.

INTEREST

Refund interest accrues at 4%.

ANNUITY OPTIONS

Option	Description
Straight Life	A lifetime annuity payable to the member determined under the regular benefit formula without adjustment.
100% Joint and Survivor	A reduced annuity payable monthly to the member for his or her lifetime. At the member's death, the named survivor will receive the same amount for his or her lifetime.

50% Joint and Survivor	**A reduced annuity payable monthly to the member for his or her lifetime. At the member's death, the named survivor will receive one-half amount for his or her lifetime.**
Ten Year Certain and Life Annuity	**A reduced annuity payable monthly to the member for his or her lifetime. If the member dies before receiving 120 payments, the remainder of the 120 monthly payments shall be payable to the member's named beneficiary or the member's estate.**

DISABILITY BENEFITS

A member may qualify for disability retirement benefits if he or she has at least 10 years of service credit, left employment because of disability, and has been unable to work because of the disability for at least 6 months. Only 5 years of service credit is necessary if the disability is a direct and total result of an act of student violence directed toward the member. All disability retirement applications must be approved by the West Virginia Consolidated Public Retirement Board.

PRE-RETIREMENT DEATH BENEFITS	If a member 50 years of age or older with 25 years of credited service dies, the surviving spouse, if named as sole beneficiary, will receive a 100% Joint & Survivor annuity for life. If a member does not meet these age and service requirements, then payment of employee contributions and refund interest, and a like amount of employee contributions, will be paid to the designated beneficiary(ies).

TEACHERS' DEFINED CONTRIBUTION RETIREMENT SYSTEM (TDC)

SUMMARY OF PLAN PROVISIONS 2010 / 2011

MEMBERSHIP	The Teachers' Defined Contribution Retirement System (TDC Plan) is a multiple employer governmental defined contribution money purchase pension plan, qualified under section 401(a) and made tax-deferred under section 414(h) of the Internal Revenue Code. The TDC Plan covers full time employees of the State's 55 county public school systems, the State Department of Education, certain Higher Education employees and the Schools for the Deaf and Blind who were hired between July 1, 1991 and June 30, 2005 when the Plan

closed for new membership. TDC Plan members may also include former TRS members, including Higher Education employees, who elected to transfer membership to the TDC Plan. Plan establishment and provisions are located under Chapter 18, Article 7B of the West Virginia State Code.

CONTRIBUTIONS In accordance with West Virginia State Code §18-7B-9, TDC Plan members are required to contribute 4.5% of their gross compensation, made on a tax-deferred basis through payroll deduction. The employer is required to contribute 7.5% of their gross compensation for a total of 12% annually.

INVESTMENTS Investment of the combined employee and employer contributions in the TDC Plan is participant directed. Members select among the Plan's wide array of investment options, comprised mostly of mutual funds, target date funds or any combination thereof. Investment services are available at various levels ranging from guidance, which is free, to managed accounts, which has a fee structure based upon the member's account balance.

VESTING

Vesting is the percentage of the employer portion of the member's account, if any, they are entitled to at the time of retirement or termination of employment. A member's vesting is determined by their total service credit in the TDC Plan and the Plan's Vesting Schedule, ranging from 0% to 100% vesting as follows:

PLAN VESTING SCHEDULE	
Years of TDC Plan Service	**% Vested in the Employer Portion**
Less than 6 years	0%
6 years – 8.999 years	33.33%
9 years – 11.999	66.67%
12 years or more	100%

BENEFITS

Benefits in the TDC Plan are based solely upon the member's vested account balance, comprised of the accumulated employee contributions and the vested employer contributions, if any, plus the net earnings thereon, at the time of retirement or termination of employment.

Members of the TDC Plan become eligible for full retirement benefits

at the minimum age of 55 with at least 12 full years of service credit in the TDC Plan. Members may also become eligible for full benefits if they are granted a disability retirement upon award by the Consolidated Public Retirement Board or upon death.

* * *

JUDGES' RETIREMENT SYSTEM (JRS)

SUMMARY OF PLAN PROVISIONS 2010 / 2011

MEMBERSHIP

The Judges' Retirement System (JRS) was established on June 5, 1949 for judges and justices of the State of West Virginia who elect to participate. JRS is a single employer defined benefit employee retirement system, providing retirement, death and disability benefits. Chapter 51, Article 9 of the West Virginia Code establishes the plan provisions for JRS.

ELIGIBILITY FOR RETIREMENT BENEFITS

Age	Years of Service	Benefit
65	At least 16 years of credited service, of which at least 12 years is as a sitting judge and/or justice *	Full Benefits

Any age	**24 years of credited service, of which at least 12 years is as a sitting judge and/or justice ***	**Full Benefits**
After 65	**Any judge and/or justice who serves at least 8 full years ****	**Full Benefits**
62	**At least 16 years of credited service, of which at least 12 years is as a sitting judge and/or justice ***	**Early Retirement with an actuarially reduced benefit**
Defer until 65	**At least 16 years of credited service, of which at least 12 years is as a sitting judge and/or justice ***	**Full Benefits**

** Provided, That every individual who is appointed or elected for the first time as a judge or justice after July l, 2005, must serve a minimum of 14 years as a sitting judge or justice.*

** Provided, That no individual who is appointed or elected for the first time as a judge or justice after July 1, 2005, is eligible for retirement benefits under this criteria*

BENEFIT FORMULA

A regular retirement benefit is an amount equal to 75% of the current salary of the office from which the

member retires. Individuals who are appointed or elected for the first time as a judge or justice after July 1, 2005, shall receive retirement benefits in an amount equal to 75% of the individual's final average salary. *Final average salary* is the average of the highest thirty-six consecutive months of compensation.

CONTRIBUTION RATES — Active members contribute 10.5% of their gross salary, tax deferred, into JRS. The Supreme Court contributes annually the amount necessary to actuarially fund JRS based on annual actuarial valuations completed by the CPRB for JRS out of the Supreme Court budget.

INTEREST — JRS accounts do not accrue interest.

PROSECUTING ATTORNEY — A judge or justice of a court of record who has served for a period of not less than 12 full years may receive credit for time served as a prosecuting attorney if the service was earned prior to 1987 and the member was a sitting judge or justice on March 14, 1987.

Assistant Prosecuting Attorney service does not qualify as eligible years of service under JRS.

DISABILITY BENEFITS

Any judge or justice who has served for ten full years, or any judge or justice over the age 65 who has served for at least six full years, who becomes physically or mentally incapacitated and cannot perform the duties of his or her office during the remainder of his or her term may be eligible for a disability retirement. The judge or justice shall make both a written application and resignation to the Governor setting forth the nature and extent of his or her disability. If the Governor determines through recommendation of the Governor's Judicial Disability Review Board that such disability exists and that public service is suffering and will continue to suffer by reason of such disability, the Governor shall submit an official written order awarding retirement benefits.

A judge or justice who retires because of disability and accepts the benefits payable under JRS because of such disability shall not, while receiving said benefits, be permitted to practice law. If a judge or justice receiving benefits for disability retirement enters the practice of law, his or her disability benefits shall be suspended for the time he or she shall be engaged in the practice of law.

The benefit payable to a judge or justice who became a member of JRS prior to April 1, 1987 and who is granted disability retirement shall be an annual retirement benefit equal to the salary he or she was receiving at the time of his or her disability retirement. This benefit is payable to the judge or justice for the remainder of his or her unexpired term. At the end of the term of office for which the judge or justice would have served, the benefit payable to the judge or justice for the remainder of his or her life is an amount equal to 75% of the current salary of the office from which the member retires. The benefit payable to a judge or justice who became a new member of JRS on or after April 1, 1987 and who is granted disability retirement is an annual retirement benefit equal to 75% of his or her highest annual salary, with allowable salary increases. This benefit is payable to the judge or justice for the remainder of his or her life.

DEATH BENEFITS

The surviving spouse of a judge or justice who dies while in office after having served five or more years as a sitting judge or justice, or a judge or justice who has already retired, shall receive 40% of the annual salary of the office which said judge or justice held

at his or her death or from which said judge or justice resigned or retired. This benefit is payable to the surviving spouse until his or her death or remarriage. Should the active salary of sitting judges or justices be increased or decreased, the benefits paid to the surviving spouse shall amount to 40% of the new salary; provided, that the annuity paid to a surviving spouse of an individual who was appointed or elected for the first time as a judge or justice after July 1, 2005, shall be an amount equal to 40% of the judge or justice's final average salary. The surviving spouse of a judge or justice who was appointed or elected for the first time after July 1, 2005, is not entitled to an increase in benefits by virtue of any increase in the salaries of active sitting judges or justices.

If there is no surviving spouse of a judge or justice who dies after having served five years or more and such judge or justice leaves surviving him or her a dependent child or children, such dependents shall receive an amount equal to 20% of the annual salary of the office which said judge or justice held at the time of his or her death: Provided, that the total of all such annuities payable to each dependent child shall not exceed in the

aggregate an amount equal to 40% of such salary. This benefit is payable to each dependent child until he or she attains the age of 18 or until he or she attains the age of 23 as long as such dependent(s) remain(s) a full-time student. Should the active salary of a sitting judge or justice be increased or decreased, the benefit payable to a dependent child or children shall amount to 20% of the new salary; provided, that the benefit of a dependent child or children of a judge or justice who is appointed or elected for the first time after July 1, 2005, shall be calculated with respect to the judge or justice's final average salary. Depended children of a judge or justice who is appointed or elected for the first time after July 1, 2005, are not entitled to an increase in benefits by virtue of any increase in the salaries of active judges or justices.

If a judge or justice dies while in office before having served five full years as a sitting judge or justice, the surviving spouse or dependent children will receive a refund of contributions paid into the retirement system.

PUBLIC SAFETY DEATH, DISABILITY, AND RETIREMENT SYSTEM (PLAN A)

SUMMARY OF PLAN PROVISIONS 2010 / 2011

MEMBERSHIP

The Public Safety Death Disability and Retirement System, commonly referred to as Plan A, was established for all state troopers on July 1, 1935. Chapter 15, Article 2 of the West Virginia Code establishes the plan provisions for Plan A. State Troopers hired on or after March 12, 1994 are not eligible for membership in Plan A. Civilian employees of West Virginia State Police are members of the Public Employees Retirement System.

ELIGIBILITY FOR RETIREMENT BENEFITS

Age	Years of Service	Benefit
50	20 years contributory service (excluding military)	Full Benefits
Any age	25 years of credited service (including military)	Fall Benefits
62	10 years of service.	Full Benefits
Less than 50	20 years of credited service (excluding military)	Deferred Benefit at age 50

BENEFIT FORMULA

The regular retirement benefit, paid in equal monthly installments, is equal to 5.5% of the member's

aggregate salary during his or her whole period of service in the Department. This benefit is payable during the lifetime of the retired member.

COST OF LIVING ALLOWANCE

Every retiree of the fund who is 55 years of age or older and who is retired under normal retirement criteria will receive an annual retirement annuity adjustment of 3.75% payable on July 1 of each year after the retiree is 55 years of age.

Every retiree of the fund who is retired under disability retirement criteria and every surviving spouse or other beneficiary receiving a benefit under the provisions of this retirement system is eligible to receive the annual retirement annuity adjustment of 3.75% payable on July 1 of each year.

CONTRIBUTION RATES

Active members of Plan A contribute 9% of their total gross salary, tax deferred, into the retirement plan for the member Normal Cost. The employer contributes an additional amount sufficient to fund the Plan benefits on an actuarially determined basis including both the employer Normal Cost plus amortizing the unfunded actuarial accrued liability as a level dollar amount through

Fiscal Year 2025 (the ARC). For Fiscal Year 2010, this requirement was $12,416,000. For Fiscal Year 2011, this requirement was $25,940,000.00. The State funds part of their ARC contribution to the system through arrest fees, accident report fees, criminal investigation reports, etc.

INTEREST — Interest accrues at 4%.

DISABILITY BENEFITS — **TOTAL DUTY DISABILITY** – Any employee of the fund who has not yet entered retirement status on the basis of age and service and who becomes permanently and totally disabled as the result of a physical or mental impairment resulting from any occupational risk or hazard inherent in or peculiar to the services required of employees of the agency or incurred pursuant to or while the member was engaged in the performance of his or her duties as an employee of the agency shall qualify for a total disability, if, in the opinion of the Board, he or she is probably permanently unable to engage in substantial gainful activity by reason of such medically determined physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a

continuous period of not less than 12 months. The benefit payable for a total duty related disability is a lifetime benefit in an annual amount equal to 8.5% of the total salary which would have been earned by the employee during 25 years, or during actual service if more than 25 years of service in the fund, based on the average earnings of the retirant while employed as an employee of the agency, but not less than $15,000 annually.

PARTIAL DUTY DISABILITY – Any employee of the fund who has not yet entered retirement status on the basis of age and service and who becomes partially disabled by injury, illness or disease resulting from any occupational risk or hazard inherent in or peculiar to the services required of employees of the agency or incurred pursuant to or while the employee was engaged in the performance of his or her duties as an employee of the agency shall qualify for a partial duty disability, if, in the opinion of the Board, he or she is by reason of that cause probably permanently unable to perform adequately the duties required of him or her as an employee of the agency, but is able to engage in any other gainful employment in a field other than law enforcement. The

benefit payable for a partial duty related disability is a lifetime benefit in an amount equal to 5.5% of the total salary which would have been earned during 25 years, or during actual service if more than 25 years in the fund, based on the average earnings of the retiree while employed as an employee of the agency, but not less than $6,000 annually.

NON-DUTY DISABILITY – Any employee while in active service of the agency may qualify for a non-duty disability if the employee has, in the opinion of the Board, become permanently partially or totally disabled and is unable to adequately perform the duties required of an employee of the agency from any cause other than those set forth in the duty related disability provisions, and not due to vicious habits, intemperance or willful misconduct on his or her part

a.) If the employee at the time of such retirement has served less than 20 years, the benefit payable shall be paid in equal monthly installments during a period equal to ⅛ the time he or she has served as an employee of the agency a sum equal to 5.5% of the total salary which would have been earned during 25 years of service. At the end of the ⅛ time period of service, the benefit payable for the remainder

of the retiree's life is an annual sum paid in monthly installments equal to ½ the base salary received by the retiree from the agency in the preceding 12 month period immediately prior to the disability award.

b.) If the employee, at the time of such retirement has served 20 years or longer, the employee is entitled to receive annually in equal monthly installments a lifetime benefit in an amount equal to 5.5% of the aggregate of salary paid to the retiree through the day immediately preceding his or her disability award.

CONTINUED DISABILITY – The Board may require subsequent medical evaluations to determine if a disability retiree has fully or partially recovered from such disability. The Board shall also require a disability benefit recipient to file an annual statement of earnings and any other information required in rules adopted by the Board.

DEATH BENEFITS

DUTY RELATED – The benefits payable to the surviving spouse for a duty related pre-retirement death, or to the surviving spouse of a member who dies after having been retired with a duty related disability are monthly

payments for his or her lifetime in which the annual benefit is equal to 5.5% of the total salary which would have been earned by the deceased member during twenty-five years of service in the Department, but not less than $6,000 annually. A surviving spouse will also receive $100 per month for each dependent child. If there is no surviving spouse, each surviving dependent child will receive 25% of the spouse's benefit. If there is no surviving spouse or dependent children, then the surviving dependent parents each receive 50% of what would have been paid to the spouse.

DEPENDENT CHILD SCHOLARSHIP – Any person qualified as a surviving dependent child of a member who died in the performance of duty or of a member who dies after having been retired with a duty related disability shall be entitled to receive a scholarship to be applied to the career development education of that dependent at a West Virginia institution.

NON-DUTY RELATED – The benefit payable to the surviving spouse of a member who dies after a normal or a non-duty related disability retirement, or after the member has served twenty years, is an amount equal to

75% of the retirement benefits the deceased member was receiving while in retirement status, or would have been entitled to receive to the same effect as if such member had been retired immediately prior to the time of his or her death, but not less than $5,000 annually. A surviving spouse will also receive $100 per month for each dependent child. If there is no surviving spouse, or the surviving spouse remarries, each surviving dependent child will receive 25% of the spouse's benefit. If there is no surviving spouse or dependent children, then the surviving dependent parents each receive 30% of what would have been paid to the spouse.

The benefits payable to the surviving spouse of a member for a non-duty related death with less than twenty years of service are monthly payments in which the annual benefit is equal to 2.75% of the total salary which would have been earned by said member during twenty-five years of service in the Department. If there is no surviving spouse, or the surviving spouse remarries, each surviving dependent child will receive 25% of the spouse's benefit. If there is no surviving spouse or dependent children, then the surviving

dependent parents each receive 50% of what would have been paid to the spouse.

STATE POLICE RETIREMENT SYSTEM (PLAN B)

SUMMARY OF PLAN PROVISIONS 2010 / 2011

MEMBERSHIP

The West Virginia State Police Retirement System, commonly referred to as Plan B, was established by the enactment of Chapter 15, Article 2A of the West Virginia Code during the 1994 Legislative Session for all state troopers hired on or after March 12, 1994. Civilian employees of the West Virginia State Police are members of the Public Employees Retirement System. State troopers hired before March 12, 1994 are not eligible for membership in Plan B.

ELIGIBILITY FOR RETIREMENT BENEFITS

Age	Years of Service	Benefit
50	25 or more years of credited service (excluding military service)	Full Benefits
52	20 or more years of credited service (excluding military service)	Full Benefits

Less than 52	**20 or more years of credited service (excluding military service)**	**Reduced Benefits**
62	**10 or more years of credited service**	**Full Benefits**

BENEFIT FORMULA

Final Average Salary x Credited Years of Service x 2.75%

Final Average Salary is the average highest annual compensation received for employment with the West Virginia State Police, including compensation paid for overtime service, received by the employee during any five calendar years within the employee's last ten years of service. This benefit is payable during the lifetime of the retiree.

CONTRIBUTION RATES

Active members of Plan B contribute 13% of then base salary, tax deferred, into the retirement plan.

For Fiscal Year 2010, the employer contributed 15% of base salary into the plan.

For Fiscal Year 2011, the employer contributed 19.50% of base salary into the plan.

Members of this retirement system are not covered by Social Security or Workers' Compensation.

INTEREST	Interest accrues at 4%.
COST OF LIVING ADJUSTMENT	Every retiree of the system who is 63 years of age or older and who is retired under normal retirement criteria will receive an annual retirement annuity adjustment of 1% payable on July 1 of each year. If the retiree is retired for less than one year on that July 1, the first annuity adjustment will be a pro rata share of the full year's annuity adjustment. Every retiree of the system who is retired under disability retirement criteria and every surviving spouse receiving a benefit under the provisions of this retirement system is eligible to receive the annual retirement annuity adjustment of 1%, payable on July 1 of each year following commencement of benefits.
DISABILITY BENEFITS	TOTAL DUTY DISABILITY – Any employee of the Agency may qualify for a total duty disability if, in the opinion of the Board, the employee has become physically or mentally permanently disabled and incapacitated from all types of gainful employment by injury, illness or disease resulting from any occupational risk or hazard inherent in or peculiar to the services required

of employees of the Agency, and such disability was incurred pursuant to or while the employee was engaged in the performance of his or her duties as an employee of the Agency. The benefit payable during the lifetime of the retiree for a total duty related disability is an amount equal to the base salary received by the employee in the preceding twelve-month employment period.

PARTIAL DUTY DISABILITY – Any employee of the Agency may qualify for a partial duty disability if, in the opinion of the Board, the employee has become physically or mentally permanently disabled by injury, illness or disease resulting from any occupational risk or hazard inherent in or peculiar to the services required of employees of the Agency, and such disability was incurred pursuant to or while the employee was or shall ! engaged in the performance of his o1 her duties as an employee of the Agency and is by reason of such cause unable to perform adequately the duties required of him or her as an employee of the Agency, but is able to engage in other gainful employment in a field other than law enforcement. The benefit payable during the lifetime of the retiree for a partial duty related disability, or until the retiree

attains the age of fifty-five or until such disability shall sooner terminate, is an amount equal to six-tenths of the base salary received in the preceding twelve-month employment period. At age fifty-five, the retiree shall receive a regular retirement benefit as it would apply to his or her final average salary based on earnings from the Agency through the day immediately preceding his or her disability.

NON-DUTY DISABILITY – Any employee while in active service of the Agency may qualify for a non-duty disability if, in the opinion of the Board, the employee becomes permanently disabled and is unable to adequately perform the duties required of an employee of the Agency from any cause other than those set forth in the duty related disability provisions, and not due to vicious habits, intemperance or willful misconduct on the employee's part. The benefit payable during the lifetime of the retiree for a non-duty related disability, or until the retiree attains the age of 55, is an amount equal to one-half the base salary received in the preceding twelve-month employment period, At age 55, the retiree shall receive a-regular retirement benefit as n would apply to his or her final average salary based

on earnings from the Agency through the day immediately preceding his or her disability.

CONTINUED DISABILITY – The Board may require subsequent medical evaluations to determine if a disability retiree has fully or partially recovered from such disability. The Board may also require a disability retiree to file an annual statement of earnings and any other information required in rules adopted by the Board.

DEATH BENEFITS

DUTY RELATED – The benefits payable to the surviving spouse for a duty related pre-retirement death, or to the surviving spouse of a retiree who dies after having been retired with a duty related disability are monthly payments for his or her lifetime in an amount equal to nine-tenths of the base salary received in the preceding twelve-month period by the deceased member, but not less than $10,000 annually. A surviving spouse will also receive $150 per month for each dependent child. If there is no surviving spouse, each surviving dependent child will receive one-third of the spouse's benefit. If there is no surviving spouse or dependent children, then the surviving dependent parents each

receive one-half of what would have been paid to the spouse.

DEPENDENT CHILD SCHOLARSHIP – Any person qualified as a surviving dependent child of an employee who died in the performance of duty or of a retiree who dies after having been retired with a duty related disability shall be entitled to receive a scholarship to be applied to the career development education of that dependent at a West Virginia institution.

NON-DUTY RELATED – The benefits payable to the surviving spouse of a retiree who dies after a normal or a non-duty related disability retirement, or after the employee served twenty years, is an amount equal to two-thirds of the retirement benefit the deceased member was receiving while in retirement status, or would have been entitled to receive to the same effect as if such member had been retired immediately prior to the time of his or her death, but not less than $5,000 annually. A surviving spouse will also receive $100 per month for each dependent child. If there is no surviving spouse, or the surviving spouse dies or remarries, each surviving dependent child will receive one-fourth of the spouse's benefit. If there is no surviving spouse

or dependent children, then the surviving dependent parents each receive one-half of what would have been paid to the spouse.

The benefits payable to the surviving spouse of an employee for a non-duty related death with less than twenty years of service are monthly payments in which the annual benefit is a sum equal to one-half of the base salary received in the preceding twelve-month employment period by the deceased employee. If there is no surviving spouse, or the surviving spouse dies or remarries, each surviving dependent child will receive one-fourth of the spouse's benefit. If there is no surviving spouse or dependent children, then the surviving dependent parents each receive one-half of what would have been paid to the spouse.

DEPUTY SHERIFF RETIREMENT SYSTEM (DSRS)

SUMMARY OF PLAN PROVISIONS 2010 / 2011

MEMBERSHIP

The Deputy Sheriff Retirement System (DSRS), a multiple-employer defined benefit employee retirement system, was established for all deputy sheriffs hired on or after July 1, 1998. Deputy Sheriffs employed prior to July 1, 1998 were eligible to transfer their PERS service to DSRS. Service as a sheriff may also be considered covered employment under certain circumstances. Chapter 7, Article 14D of the West Virginia Code establishes the plan provisions for DSRS.

ELIGIBILITY FOR RETIREMENT BENEFITS

Age	Years of Service	Benefit
50 while still in covered employment	Rule of 70 = Age plus service equal 70 (excluding military service)	Full Benefits
60 while still in covered employment	Completion of 5 years of service (excluding military service)	Full Benefits
62	Completion of 5 or more years or service (excluding military service)	Full Benefits

50 and not in covered employ-ment	**20 years of service (excluding military service)**	**Full Benefits**
40	**20 years of service (excluding military service)**	**Reduced Benefits**

BENEFIT FORMULA

Final Average Salary x Years of Credited Service x 2.25%

Final average salary refers to the average of the highest annual compensation received for covered employment by the member during any five consecutive plan years within the member's last ten years of service.

CONTRIBUTION RATES

Active members contribute 8.5% of their monthly salary, tax deferred, and the Sheriff's Office of the county in which the member is employed in covered employment contributes an additional 10.5% of the member's monthly salary. In addition, the Sheriff's Office contributes certain fees charged for reports and other services provided by the Sheriff's Offices. A member is vested after completion of 60 months covered employment.

INTEREST — Interest accrues at 4%.

ANNUITY OPTIONS

Option	Description
Straight Life Annuity	A lifetime annuity payable monthly to the member determined under the regular benefit formula without adjustment.
Option A – True Joint and Survivor Annuity	A reduced annuity payable monthly to the member. Upon the death of either the member or the beneficiary, the annuity is further reduced to either 50%, 66⅔%, 75% or 100% of the original monthly amount dependent on the original option elected by the member. The reduced benefit is payable to the surviving member or beneficiary for the remainder of their life.
Option B – Joint and Survivor Annuity	A reduced annuity payable monthly to the member. Upon death of the member, a reduced annuity of either 50%, 66⅔%, 75% or 100% of the original monthly amount, dependent on the original option elected by the member, is payable to the named beneficiary. There is no change in the original monthly amount if the beneficiary dies first.
Option C – Ten Years Certain and Life Annuity	A reduced annuity payable monthly to the member. If the member dies before receiving 120 monthly payments, the remainder of the 120 monthly payments shall be payable to the

	member's beneficiary or the member's estate.
Option D – Level Income Annuity	An increased annuity payable monthly to the member until the member attains Social Security Retirement Age. After Social Security Retirement Age, the benefit is reduced by the estimated Primary Insurance Amount determined at retirement. The reduced benefit is payable monthly for the remaining lifetime of the member. There are no death benefits under this option.

DISABILITY BENEFITS

TOTALLY DISABLED means a member's inability to engage in substantial gainful activity by reason of any medically determined physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months. A member is totally disabled only if his/her physical or mental impairment is so severe that he/she is not only unable to perform his/her previous work as a deputy sheriff but also cannot, considering the member's age, education and work experience, engage in any other kind of substantial gainful employment which exists in the state.

PARTIALLY DISABLED means a member's inability to engage in the duties of deputy sheriff by reason of any medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months. A member may be determined partially disabled and maintain the ability to engage in other gainful employment which exists within the state but which ability would not enable him/her to earn an amount at least equal to ⅔ of the average annual compensation earned by all active members of this plan during the plan year ending the most recent 30th day of June.

DUTY RELATED DISABILITY BENEFITS:

TOTAL DUTY: 90% of the member's average full monthly compensation for the 12 month contributory period preceding his/her disability payable for life.

PARTIAL DUTY: 45% of the member's average full monthly compensation for the 12 month contributory period preceding his/her disability award until age 60, then reverts to normal retirement, plus ½ time disability service.

NON DUTY RELATED DISABILITY BENEFITS:

TOTAL NON-DUTY: 66⅔% of the member's average full monthly compensation for the 12 month contributory period preceding his/her disability award until age 60, then reverts to normal retirement, plus ½ time disability service.

PARTIAL NON-DUTY: 33⅓% of the member's average full monthly compensation for the 12 month contributory period preceding his/her disability award until age 60, then reverts to normal retirement, plus ½ time disability service.

DEATH BENEFITS

DUTY RELATED – The surviving spouse of any member who, while in covered employment, has died or dies by reason of injury, illness or disease resulting from an occupational risk or hazard inherent in or peculiar to the service required of members, while the member was or is engaged in the performance of his/her duties as a deputy sheriff, or the surviving spouse of a member who dies from any cause after having been retired with a duty related disability shall be entitled to receive the greater of ⅔ of the annual compensation received in the preceding 12 month period by the

deceased member or; if the member dies after his/her early or normal retirement age the monthly amount the spouse would have received had the member retired the day before his/her death and elected a 100% Joint and Survivor annuity with the spouse as the joint annuitant, and then died.

NON-DUTY RELATED – The surviving spouse of any member who has been a member for at least 10 years, while in covered employment, who has died or dies from non-duty related causes and not due to vicious habits, intemperance, or willful misconduct on his/her part shall receive the greater of 50% of the annual compensation received in the preceding 12 month period by the deceased member; or if the member dies after his/her early or normal retirement age, the monthly amount which the spouse would have received had the member retired the day before his/her death, elected a 100% Joint and Survivor annuity with the spouse as the joint annuitant, and then died

DEPENDENT BENEFITS – A surviving spouse of a member who dies of a duty or non-duty related death is also entitled to receive $100 monthly for each dependent child. If the surviving spouse dies, or if there is no surviving spouse, the fund shall pay monthly to

each dependent child a sum equal to ¼ of the surviving spouse's entitlement. If there is neither a surviving spouse nor a dependent child, the fund shall pay to the dependent parents of the deceased member a sum equal to what the surviving spouse would have received without children. When there is only one dependent parent surviving, that parent is entitled to receive ½ the amount which both parents would have been entitled to receive.

DEPENDENT CHILD SCHOLARSHIP – Any person qualifying as a dependent child of a deceased member or retirant of this retirement system shall be entitled to receive scholarship monies to be applied to the career development education of that dependent at a West Virginia institution.

BURIAL BENEFITS – Any member who dies as a result of any duty-related illness or injury is entitled to receive a lump sum burial benefit of $5,000, to be paid to the member's spouse, or to the member's estate if not married. Any unspent balance shall be distributed as part of the member's estate.

EMERGENCY MEDICAL SERVICES RETIREMENT SYSTEM (EMSRS)

SUMMARY OF PLAN PROVISIONS 2010 / 2011

MEMBERSHIP

The Emergency Medical Services Retirement System (EMSRS) was established January 1, 2008 for the purpose of providing retirement benefits for emergency medical services officers employed on or after January 1, 2008 by participating public employers who voluntarily elected to participate.

Emergency medical services officers employed and participating in PERS prior to January 1, 2008, were eligible to transfer their PERS service to EMSRS if their employer elected to participate in EMSRS. Emergency medical services officers employed by Non-PERS participating political subdivisions were eligible to purchase service worked prior to joining EMSRS. Chapter 16, Article 5V of the West Virginia Code established the plan provisions for EMSRS.

ELIGIBILITY FOR

Age	Years of Service	Benefit
50	20 or more years contributory service	Full Benefits

RETIREMENT BENEFITS

50 while still in covered employment	**When age plus contributory service equals 70 while still in covered employment**	**Full Benefits**
60 while still in covered employment	**10 years contributory service while still in covered employment**	**Full Benefits**
62	**5 years contributory service**	**Full Benefits**
45	**20 years contributory service**	**Reduced Benefits**

BENEFIT FORMULA

2.75% x FAS x Years of Service for years 1–20

2.0% x FAS x Years of Service for years 21–25

1.0% x FAS x Years of Service for years 26–30

Final Average Salary refers to the average of the highest annual compensation received for covered employment by the member during any five consecutive plan years within the member's last 10 years of service.

CONTRIBUTION RATES

An active member of EMSRS contributes 8.5% of his or her monthly gross salary, tax deferred, to the plan. The employer contributes an additional 10.5% of the member's

gross monthly salary for total combined contributions equal to 19%.

INTEREST — Interest accrues at 4%.

ANNUITY OPTIONS

Option	Description
Straight Life Annuity	A lifetime annuity payable monthly to the member determined under the regular benefit formula with no adjustment.
Option A-Contingent Joint and Survivor Annuity	A life annuity payable during the joint lifetime of the member and his or her named survivor. Upon the death of the member, the named survivor shall receive a lifetime annuity in a reduced amount equal to 50%, 66⅔%, 75% or 100% of the amount paid while both were living, as selected by the member.
Option B-Ten Years Certain and Life Annuity	A reduced annuity payable monthly to the member. If the member dies before receiving 120 monthly payments, the remainder of the 120 monthly payments shall be payable to the member's beneficiary or the member's estate.

DISABILITY BENEFITS — **TOTALLY DISABLED** means a member's inability to engage in substantial gainful activity by reason

of any medically determined physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than twelve months. A member is totally disabled only if his or her physical or mental impairment is so severe that he or she is not only unable to perform his or her previous work as an emergency medical services officer but also cannot, considering his or her age, education and work experience, engage in any other kind of substantial gainful employment which exists in the State.

Duty Related Disability – Any member of EMSRS who becomes totally disabled while in covered employment by injury, illness or disease as a result of an occupational risk or hazard while performing the services required of an emergency medical services officer is entitled to receive a duty disability benefit, provided that it is determined by two physicians, one of whom shall be named by the CPRB, that he or she is not only unable to perform adequately the duties required of an emergency medical services officer, but also cannot engage in any other kind of substantial gainful employment.

NON DUTY RELATED DISABILITY – Any member of EMSRS who becomes totally disabled while in covered employment from any cause other than a duty related injury, illness or disease and which cause is not due to vicious habits or willful misconduct is entitled to receive a non-duty disability benefit, provided that it is determined by two physicians, one of whom shall be named by the CPRB, that he or she is not only unable to perform adequately the duties required of an emergency medical services officer, but also cannot engage in any other kind of substantial gainful employment.

DEATH BENEFITS

DUTY RELATED – The surviving spouse of any member who, while in covered employment, has died or dies by reason of injury, illness or disease resulting from an occupational risk or hazard inherent in or peculiar to the service required of members, while the member was or is engaged in the performance of his or her duties as an emergency medical services officer, or the surviving spouse of a member who dies from any cause after having been retired with a duty related disability, will be entitled to receive the greater of ⅔ of the annual compensation received in the preceding 12 month

period by the deceased member; or if the member dies after his or her early or normal retirement age, the monthly amount the spouse would have received had the member retired the day before his or her death and elected a 100% Joint and Survivor annuity with the spouse as the joint annuitant, and then died

NON DUTY RELATED – The surviving spouse of any member who has been a member for at least 10 years who, while in covered employment, has died or dies from non-duty related causes and not due to vicious habits, intemperance or willful misconduct on his/her part shall receive in equal monthly installments during his or her lifetime an amount equal to the greater of ½ of the annual compensation received in the preceding 12 month period by the deceased member; or if the member dies after his/her early or normal retirement age, the monthly amount which the spouse would have received had the member retired the day before his/her death, elected a 100% Joint and Survivor annuity with the spouse as joint annuitant, and then died.

DEPENDENT BENEFITS – A surviving spouse of a member who dies of a duty or non-duty related death is also entitled to receive $100 monthly for

each dependent child. If the surviving spouse dies, or if there is no surviving spouse, the fund shall pay monthly to each dependent child a sum equal to 100% of the surviving spouse's entitlement divided by the number of dependent children. If there is neither a surviving spouse nor a dependent child, the fund shall pay to the dependent parents of the deceased member a sum equal to what the surviving spouse would have received without children. When there is only one dependent parent surviving, that parent is entitled to receive ½ the amount which both parents would have been entitled to receive.

Dependent Child Scholarship – Any person qualifying as a dependent child of a deceased member or retirant of this retirement system shall be entitled to receive scholarship monies to be applied to the career development education of that dependent at a West Virginia institution.

Burial Benefits – Any member who dies as a result of any duty-related illness or injury is entitled to receive a lump sum burial benefit of $5,000 to be paid to the member's spouse, or to the member's estate if not married. Any unspent balance shall be

distributed as a part of the member's estate.

MUNICIPAL POLICE OFFICERS AND FIREFIGHTERS RETIREMENT SYSTEM (MPFRS)

SUMMARY OF PLAN PROVISIONS 2010 / 2011

MEMBERSHIP

The MPFRS Act was passed by the Legislature in November 2009, and became effective January 1, 2010. The legislation provided for any municipality or municipal subdivision employing municipal police officers or firefighters to elect to become a participating employer. MPFRS is a multiple employer defined benefit retirement system. If there are fewer than 100 members on January 1, 2014, all members will be merged into the Emergency Medical Services Retirement System. All police officers and firefighters first employed in covered employment after the date the municipality or municipal subdivision elected to join MPFRS are required to be members of MPFRS. Chapter 8 Article 22A of the West Virginia Code establishes the provisions for MPFRS.

ELIGIBILITY FOR RETIREMENT BENEFITS

Age	Years of Service	Benefit
Age 50	20 or more years contributory service	Full Benefits
Age 50 while still in covered employment	When age plus contributory service equals 70	Full Benefits
Age 60 while still in covered employment	10 years contributory service	Full Benefits
Age 62	5 years contributory service	Full Benefits

BENEFIT FORMULA

The accrued benefit on behalf of any member is calculated as follows, not to exceed 67%:

Final Average Salary x Years of Credited Service x Benefit Percentage

2.6% x FAS x Years of Credited Service for years 1–20
2.0% x FAS x Years of Credited Service for years 21–25
1.0% x FAS x Years of Credited Service for years 26–30

Final Average Salary refers to the average of the highest annual compensation received for covered employment by the member during any five consecutive plan years within the member's last 10 years of service.

CONTRIBUTION RATES

Currently, the MPFRS employee contribution rate is 8.5% of gross monthly salary and the employer contribution rate is 8.5% of gross monthly salary. As provided in statute, the Board may recommend the employee contribution rate be increased to 10.5% if the MPFRS plan does not reach a 70% funded level by July 1, 2014.

INTEREST

Interest accrues at 4%.

ANNUITY OPTIONS

Option	Description
Straight Life Annuity	A lifetime annuity payable monthly to the member determined under the regular benefit formula with no adjustment.
Option A-Contingent Joint and Survivor Annuity	A life annuity payable during the joint lifetime of the member and his or her named beneficiary. Upon the death of the member, the named beneficiary shall receive a lifetime annuity in a reduced amount equal to 50%, 66 ⅔%, 75% or 100% of the amount paid while both were living, as selected by the member.
Option B-Ten Years Certain and Life Annuity	A reduced annuity payable monthly to the member. If The member dies before receiving 120 monthly payments, the remainder of the 120 monthly

	payments shall be payable to the ,member's beneficiary or the member's estate.

BENEFITS

No member is entitled to retirement, disability or death benefits under this retirement system until January 1, 2013.

DISABILITY BENEFITS

TOTALLY DISABLED means a member's inability to engage in substantial gainful activity by reason of any medically determined physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than twelve months. A member is totally disabled only if his or her physical or mental impairment is so severe that he or she is not only unable to perform his or her previous work as a police officer or firefighter but also cannot, considering his or her age, education and work experience, engage in any other kind of substantial gainful employment which exists in the state.

DUTY RELATED DISABILITY – Any member of MPFRS who becomes totally disabled while in covered employment by injury, illness or disease as a result of an occupational risk or hazard while performing the

services required of a police officer or firefighter is entitled to receive a duty disability benefit, provided that it is determined by two physicians, one of whom shall be named by the CPRB, that he or she is not only unable to perform adequately the duties required of a police officer or firefighter, but also cannot engage in any other kind of substantial gainful employment. The benefit payable for a duty related disability is an amount equal to 90% of the member's last 12 full months average salary until age 65, and then "normal retirement" plus ⅓ time disability service.

NON DUTY RELATED DISABILITY – Any member of MPFRS who becomes totally disabled while in covered employment from any cause other than a duty related injury, illness or disease and which cause is not due to vicious habits or willful misconduct is entitled to receive a non-duty disability benefit, provided that it is determined by two physicians, one of whom shall be named by the CPRB, that he or she is not only unable to perform adequately the duties required of a police officer or firefighter, but also cannot engage in any other kind of substantial gainful employment. The benefit payable for a non-duty related disability is an

amount equal to 66⅔% of the member's last 12 months average salary until age 60 and then normal retirement plus ⅙ time disability service.

DEATH BENEFITS

DUTY RELATED – The surviving spouse of any member who, while in covered employment, has died or dies by reason of injury, illness or disease resulting from an occupational risk or hazard inherent in or peculiar to the service required of members, while the member was or is engaged in the performance of his or her duties as a police officer or firefighter, or the surviving spouse of a member who dies from any cause after having been retired with a duty related disability, is entitled to receive in equal monthly installments during his or her lifetime an amount equal to the greater of ⅔% of the annual compensation received in the preceding 12 month period by the deceased member; or if the member dies after his or her normal retirement age the monthly amount the spouse would have received had the member retired the day before his or her death and elected a 100% Joint and Survivor annuity with the spouse as the joint annuitant, and then died.

NON-DUTY RELATED – The surviving spouse of any member who has been a member for at least 10 years who, while in covered employment, has died or dies from non-duty related causes and not due to vicious habits, intemperance or willful misconduct on his or her part shall receive in equal monthly installments during his or her lifetime an amount equal to the greater of ½ of the annual compensation received in the preceding 12 month period by the deceased member; or if the member dies after his or her normal retirement age, the monthly amount which the spouse would have received had the member retired the day before his or her death, elected a 100% Joint and Survivor annuity with the spouse as joint annuitant, and then died.

DEPENDENT BENEFITS – A surviving spouse of a member who dies of a duty or non-duty related death is also entitled to receive $100 monthly for each dependent child. If the surviving spouse dies, or if there is no surviving spouse, the fund shall pay monthly to each dependent child a sum equal to 100% of the surviving spouse's entitlement divided by the number of dependent children. If there is neither a surviving spouse nor a dependent child, the fund shall pay to the

dependent parents of the deceased member a sum equal to what the surviving spouse would have received without children. When there is only one parent surviving, that parent is entitled to received ½ the amount which both parents would have been entitled to receive.

DEPENDENT CHILD SCHOLARSHIP – Any person qualifying as a dependent child of a deceased member or retirant of this retirement system shall be entitled to receive scholarship monies to be applied to the career development education of that dependent at a West Virginia institution.

BURIAL BENEFITS – Any member who dies as a result of any duty-related illness or injury is entitled to receive a lump sum burial benefit of $5,000 to be paid to the member's spouse, or to the member's estate if not married. Any unspent balance shall be distributed as a part of the member's estate.

Plan Provisions

Actuarial Information

Valuation Date – All valuations were completed as of July 1, 2009 for the 2010 Fiscal Year and July 1, 2010 for the 2011 Fiscal Year.

Actuarial Cost Method – All Valuations were completed applying the Entry Age Past Service with Aggregate Normal Cost actuarial cost method.

Asset Valuation Method – All plan assets are valued at reported Market Value as of July 1, 2009 or July 1, 2010 and adjusted for accrued amounts.

Amortization Methodology and Remaining Past Service Amortization Period – Differs by plan based on statutory funding or targeted funding and is summarized below:

Public Employees (PERS) – Normal Cost is amortized as a level percentage of future payrolls of the active membership group as of the Valuation date. Employer contributions of 11% for Fiscal Year 2010 and 12.5% for Fiscal Year 2011 are first applied to the normal Cost with the remaining contributions applied to amortize the unfunded past service. Contributions are sufficient if the unfunded past service will be fully amortized on level dollar funding basis through June 30, 2035. As of the Valuation date, contributions were sufficient to cover unfunded past service amortization and will meet the funding sufficiency test.

Teachers' Defined Benefit (TRS) – Normal Cost is amortized as a level percentage of future payrolls of

the active membership group as of the Valuation date. Unfunded past service is amortized as a level dollar amount through June 30, 2034.

JUDICIAL SYSTEM (JRS) – Normal Cost is amortized as a level percentage of future payrolls of the active membership group plus the PERS members eligible to elect a transfer to JRS as of the Valuation date. Past service was fully funded in Fiscal Year 2010.

PSDDRS (PLAN A) – The total of the normal Cost plus the amortization of the unfunded past service is calculated to be paid as a level dollar amount, through June 30, 2025.

SPRS (PLAN B) – Normal Cost is amortized as a level percentage of future base payroll of the active membership group as of the Valuation date. Employer contributions of 15.0% of base payroll for Fiscal Year 2010 and 19.5% for Fiscal Year 2011 are first applied to pay the Normal Cost with the remaining contributions applied to amortize the unfunded past service. Contributions are sufficient if the unfunded past service will be fully amortized by June 30, 2030 based on level dollar funding. As of the valuation date, contributions were sufficient to cover the funding required to meet the sufficiency test.

DEPUTY SHERIFF (DSRS) – Normal Cost is amortized as a level percentage of future payrolls of the active membership group as of the Valuation date. Employer contribution of 10.5% of base payroll plus certain dedicated fees are first applied to pay the Normal Cost

with the remaining contributions applied to amortize the unfunded past service. Contributions are sufficient if the unfunded past service will be fully amortized by June 30, 2029. Payments are based on a level percentage of future payroll funding, including anticipated future hires. As of the Valuation date, contributions were not sufficient to meet the sufficiency test. Based on the current contribution rate, the unfunded past service will not be funded by June 20, 2029.

Emergency Medical Services Retirement System (EMSRS) – Normal Cost is amortized as a level percentage of future payrolls of the active membership group as of the Valuation date. Employer contribution of 10.5% of payroll are first applied to pay the employer Normal Cost with the remaining contributions applied to amortize the unfunded past service. Contributions are sufficient to fully fund the unfunded past service by June 30, 2038 applying level dollar amortization.

Municipal Police and Fire Retirement System (MPFRS) Normal Cost is amortized as a level percentage of future payrolls of the active membership group as of the Valuation date. Employer contribution of 8.5% of payroll are first applied to pay the employer Normal Cost with the remaining contributions applied to amortize the unfunded past service. Contributions are sufficient to fully fund the unfunded past service by June 30, 2041 applying level dollar amortization.

RETIREMENT PLAN RUNNING STATISTICS AS OF JUNE 30, 2010

	PERS	TRS	JRS	PSDDRS Plan A	SPRS Plan B	DSRS	EMSRS
Actives	35,717	35,701	71	163	472	926	511
Retirees	21,499	29,245	58	669	14	248	0
Vested Termination	3,884	1,636	2	5	4	64	16
UAL (in millions)	$999.5	$5,053.1	$4.9	$210.7	$21.3	$51.0	9.8
Percent Funded	79.7%	41.3%	94.8%	63.3%	65.4%	60.5%	63.7%
Actuarial Value of Assets (in millions)	$3,930.7*	$3,554.8	$88.3	$362.9	$40.3	$78.2	17.2

** Actuarial value based on 4 year smoothing method*

DEFINED BENEFIT RETIREMENT PLAN FIGURES AS OF JUNE 30, 2010

	PERS	TRS	JRS	PSDDRS Plan A	SPRS Plan B	DSRS	EMSRS
NEW RETIREES							
Number of New Retirements	1,257	1,773	0	18	2	12	0
Average Years of Service	22.87	29.95	0	28.32	27.5	26.47	0
Average Monthly Benefit	$1,485	$2,290	$0	$5,534	$3,684	$2,349	0
Average Age	60.42	60.42	0	48.72	55	53.83	0
Average Monthly Salary Receiving at Retirement	$3,125	$3,801	N/A	N/A	$4,737	$3,659	0
ALL RETIREES							
Number of Retirees	23,413	31,771	60	687	17	260	0
Average Years of Service	21.02	29.95	19.64	25.16	11.30	26.46	0
Average Monthly Benefit	$1,013	$2,289	$6,025	$3,779	$2,260	$2,349	0

	PERS	TRS	JRS	PSDDRS Plan A	SPRS Plan B	DSRS	EMSRS
ACTIVE MEMBERS	35,938	36,611	53	146	498	958	525
INACTIVE MEMBERS	15,355	3,089	1	5	109	192	102
WITHDRAWALS							
Number of Withdrawals	1,766	489	2	0	6	39	27
Amount of Withdrawals	$8,489,769	$7,515,683	$86,435	$0	$201,729	$540,390	$171,074

RETIREMENT PLAN RUNNING STATISTICS AS OF JUNE 30, 2011

	PERS	TRS	JRS	PSDDRS Plan A	SPRS Plan B	DSRS	EMSRS	PERS
Active	35,977	35,670	71	147	498	958	525	6
Retirees	22,040	30,127	56	684	17	260	0	0
Vested Termination	3,883	1,621	0	3	8	65	27	0
UAL (in millions)	$1,351.2	$4,760.8	($6.8)	$186.3	$16.4	$46.9	7.8	$0.0
Percent Funded	76.6%	46.5%	107.1%	68.5%	76.2%	66.4%	75.1%	79.7%
Actuarial Value of Assets (in millions)	$3,974.6*	$4,143.5	$102.8	$404.4	$52.7	$92.7	$23.7	$0.0

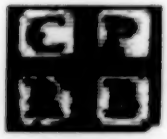
** Actuarial value based on 4 year smoothing method*

DEFINED BENEFIT RETIREMENT PLAN FIGURES AS OF JUNE 30, 2011

	PERS	TRS	JRS	PSDDRS Plan A	SPRS Plan B	DSRS	EMSRS	PERS
NEW RETIREES								
Number of New Retirements	1,410	1,808	2	15	0	17	8	0
Average Years of Service	24	29.80	35.29	28.03	N/A	24.30	22.33	0
Average Monthly Benefit	$1,582	$2,300	$7,875	$5,695	N/A	$2,195	$2,406	0
Average Age	60.75	60.59	67	49.20	N/A	55.29	53.94	0

	PERS	TRS	JRS	PSDDRS Plan A	SPRS Plan B	DSRS	EMSRS	PERS
Average Monthly Salary Receiving at Retirement	$3,288	$3,820	N/A	N/A	N/A	$3,722	$3,844	0
ALL RETIREES								
Number of Retirees	23,978	32,113	61	693	17	269	19	0
Average Years of Service	21.63	27.58	20.30	25.25	11.75	26.48	21.70	0
Average Monthly Benefit	$1,054	$1,481	$6,429	$3,964	$2,275	$1,826	$2,324	0
ACTIVE MEMBERS	36,254	35,883	50	131	522	954	535	9

	PERS	TRS	JRS	PSDDRS Plan A	SPRS Plan B	DSRS	EMSRS	PERS
INACTIVE MEMBERS	16,045	3,256	1	6	116	212	105	4
WITHDRAWALS								
Number of Withdrawals	2,054	585	2	0	15	56	42	0
Amount of Withdrawals	$9,877,760	$8,377,574	$86,435	$0	$482,054	$680,713	$376,382	0



West Virginia

Consolidated Public Retirement Board

Component Unit of the State of West Virginia

Comprehensive
Annual
Financial
Report

* * *

FINANCIAL SECTION

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD NOTES TO FINANCIAL STATEMENTS

1 – DESCRIPTION OF ORGANIZATION

Reporting Entity

During fiscal year 1991, the West Virginia State Legislature created the Consolidated Public Retirement Board (the Board) to administer nine of the State of West Virginia's ten retirement plans. The nine retirement plans included within these financial statements are the Public Employees' Retirement System (PERS), the Teachers' Retirement System (TRS), the Public Safety Death, Disability and Retirement System (PSDDRS), the State Police Retirement System (SPRS), the Deputy Sheriff Retirement System (DSRS), the Judges' Retirement System (JRS), the Emergency Medical Services Retirement System (EMSRS), Municipal Police Officers and Firefighters Retirement System (MPFRS) and the Teachers' Defined Contribution Retirement System (TDCRS). The Total Pension Funds column included in the statement of plan net assets and statements of changes in plan net assets is for informational purposes only. The net assets of each plan are only available to satisfy the obligations of that plan. The Board is a component unit of the State of West Virginia (the State). The Governmental Employees Deferred Compensation Plan is

administered by the West Virginia State Treasurer's Office and has been excluded from these financial statements in accordance with Governmental Accounting Standards Board (GASB) Statement No. 32, *Accounting and Financial Reporting for Internal Revenue Code Section 457 Deferred Compensation Plans.*

The Internal Service Fund (the Fund) is used for the administration of all plans administered by the Board. The Fund receives a service fee from each plan based upon the number of participants included in the plan. These fees are legally restricted for the purpose of administering the plans and are not available for any other purpose.

The Board is managed by a Board of Trustees, which consists of, by virtue of their position, the Governor, State Auditor, State Treasurer, and Secretary of the Department of Administration, together with the following gubernatorial appointments that are subject to the advice and consent of the State Senate: four residents of the State who are not participants in the retirement plans, one State and one non-State employee participant in PERS, and one participant each from TRS, PSDDRS, SPRS, DSRS, EMSRS, MPFRS and TDCRS.

Pursuant to the West Virginia Code, the Board submits a detailed budgetary schedule of administrative expenses to the Secretary of the Department of Administration prior to the beginning of each fiscal year. The fundamental purpose of budgetary control is to plan for the expected level of operations and to provide management with a tool to

control deviation from such plan but does not constitute a legally adopted budget.

Basis of Accounting

The financial statements of the Board have been prepared in conformity with accounting principles generally accepted in the United States of America as applied to governmental units. The GASB is the accepted standard setting body for establishing governmental accounting and financial reporting principles for governmental units. The accompanying pension fund financial statements have been prepared using the flow of economic resources measurement focus and the accrual basis of accounting. Plan member contributions are recognized in the period when contributions are due. Employer contributions to the plan are recognized when due and the employer has made a formal commitment to provide contributions. Benefits and refunds are recognized when due and payable in accordance with the terms of each plan. The Internal Service Fund financial statements have also been prepared using the flow of economic resources measurement focus and the accrual basis of accounting. The Board's assets are held primarily in accounts maintained by the State Treasurer, the West Virginia Investment Management Board (the IMB), and the third-party administrator of its defined contribution plan.

Cash

The State Treasurer has statutory responsibility for the daily cash management activities of the state's agencies, departments, boards and commissions. The amounts on deposit with the State Treasurer are available for immediate withdrawal and, accordingly,

are presented as cash and cash equivalents in the accompanying financial statements.

Investments

All defined benefit plan funds not required to meet disbursement needs are invested in accordance with the West Virginia Code, as well as policies established by the IMB. The IMB has established various investment pools to provide for the investment of the defined benefit plan assets. These investment pools are structured as multiparticipant variable net asset funds.

Investments of the IMB Short-term Fixed Income pool are carried at amortized cost, which approximates fair value. The investments in the other IMB pools, except as noted below, are carried at fair value, which is determined by a third party pricing service based on asset portfolio pricing models and other sources. The IMB invests in private equity, real estate, and hedge funds, which are not publicly traded, and are carried at estimated fair value as provided by the IMS funds' management. The IMB may, in addition, consider other factors in assessing the fair value of these investments. Because these investments are not marketable, the estimated value is subject to uncertainty, and therefore, may differ from the value that would have been used had a ready market for the investment existed. Futures and option contracts are valued at the last settlement price established each day by the exchange on which they are traded. Interest rate swap values are based on market values received From third parties or are determined by valuation models. Foreign currency forward contracts are valued at either spot or forward month-end

exchange rates. Investments in commingled investment pools are valued at the reported unit values of the individual funds as provided to the IMB fund's management.

The TDCRS investments are held by an investment company which also serves as the third party administrator for the plan. As prescribed by West Virginia Code, the TDCRS investments are allocated to participant accounts and the participants direct the investment of their individual account balances by selecting from a list of plan mutual funds or a long term fixed investment option.

The TDCRS investments are carried at fair value as determined by a third-party pricing service utilized by an investment management company. Investment income for the TDCRS is determined monthly and distributed to the individual participant accounts.

Contributions Receivable

Contributions receivable represent funds owed to the Board from other government employer entities participating in the various retirement plans.

Participant Loans Receivable

The TRS makes loans to its members, hired prior to July 1, 2005, up to the lesser of one-half of a member's accumulated contributions or $8,000, at an interest rate indexed to the interest rate used by the Board for determining actuarial contributions levels. TRS loans require repayment over varying terms, with a maximum term of five years.

During the 2008 First Special Session, the West Virginia Legislature passed House Bill 101 regarding retirement benefits for teachers and educational

service personnel which became effective Sunday, March 16, 2008. The legislation provided an opportunity for members of the Teachers' Defined Contribution Retirement System (TDCRS) to elect to transfer to the West Virginia Teachers' Retirement System (TRS). The transfer occurred on July 1, 2008 and a total of 15,152 TDCRS members transferred to TRS. These members were granted 75% service created under TRS for their years of service in TDCRS. These members were also granted a one time opportunity to receive a loan in order to purchase the additional 25% service credit at a 7.5% interest rate and with a maximum term of five years. The last day to receive such a loan was June 30, 2010.

The DSRS also makes loans to its members, hired prior to July 1, 2005, up to the lesser of one-half of a member's accumulated contributions or $8,000, at an interest rate indexed to the interest rate used by the Board for determining actuarial contributions levels. DSRS loans require repayment over varying terms, with a maximum term of five years.

Accrued Expenses and Other Payables

Accrued expenses and other payables primarily represent retirement annuity amounts due to new retirees.

Compensated Absences

Liabilities for compensated absences (annual leave) are recorded for an employees' right to receive compensation for future absences. When an employee is separated from employment with the Board for reasons other than retirement, all sick leave credited to that employee is considered nonvested and no reimbursement to the employee is provided. Accrued

sick leave, if any, existing for employees upon their retirement, may be used either to extend benefits provided by the West Virginia Public Employees Insurance Agency or to increase retirement benefits. Other post-employment benefits other than pensions are described in Note 5.

Capital Assets

The Board does not record any capital assets with a value of less than $5,000 per asset. The only asset currently capitalized consists of agency developed software, which has an estimated useful life of ten years.

Accounting Estimates

The preparation of financial statements in accordance with accounting principles generally accepted in the United States of America requires management to make estimates and assumptions that affect the reported amounts of assets, liabilities, and disclosure of actuarial accrued liabilities, contingent assets, and contingent liabilities as of the financial statement date, and the reported amounts of additions and deductions for the reporting period. Actual amounts could differ from those estimates.

The various retirement plans utilize various investment instruments. Investment securities, in general, are exposed to various risks, such as interest rate, credit, and overall market volatility. Due to the level of risk associated with certain investment securities, it is reasonably possible that changes in the value of investment securities will occur in the near term and that such change could materially affect the amounts reported in the statements of plan net assets. Changes in the value of investment securities could

affect the future funding status of the plans or require additional contributions to maintain the current funding status.

2 – PLAN DESCRIPTIONS AND CONTRIBUTION INFORMATION

Funding policies for all plans have been established by and are changed from time-to-time by action of the State Legislature. While contribution rates are legislatively determined, actuarial valuations are performed to assist the Board and the State Legislature in determining contribution rates. The following information is provided for general information purposes only. Plan participants should refer to the respective West Virginia State Code Section for more complete information.

Defined Benefit Plans

Public Employees' Retirement System

Plan Description – PERS is a multiple employer defined benefit cost sharing public employee retirement system covering substantially all employees of the State and its component units, as well as employees of participating non-State governmental entities who are not participants of another state or municipal retirement system. The number of participating local government employers as of June 30, 2012 and 2011, are as follows:

	2012	2011
Cities and towns	105	105
Counties	55	55
Special districts	371	370
	531	530

PERS provides retirement benefits as well as death and disability benefits. Qualification for normal retirement is age 60 with five years of service or at least age 55 with age and service equal to 80 or greater. The straight-life annuity retirement benefit is equivalent to 2% of average salary multiplied by years of service. Average salary is the average of the three consecutive highest annual earnings out of the last fifteen years of earnings. Terminated members with at least five years of contributory service who do not withdraw their accumulated contributions may elect to receive their retirement annuity beginning at age 62.

Chapter 5, Article 10 of the West Virginia State Code assigns the authority to establish and amend the provisions of the plan to thoe State Legislature. In certain circumstances, this Article also permits members of TRS to transfer accumulated service credit and member contributions into PERS.

Contributions – Per Chapter 5, Article 10, members contribute 4.5% of annual earnings. State and non-state governmental employers' contribution rates were 14.5% and 12.5% of covered employees' annual earnings for fiscal years ending June 30, 2012 and 2011, respectively. Effective July 1, 2012 employer contribution rates will be reduced to 14% of members annual earnings. Contributions as a percentage of payroll for members are established by statutes, subject to legislative limitations and are not actuarially determined. Contributions as a percentage of payroll for employers are established by the Board. In addition, certain additional contributions of approximately $908,000 and $0 were

made during the years ended June 30, 2012 and 2011, respectively, representing extra appropriations to pay off the unfunded liability. Employer contributions from State and non-State agencies for the fiscal years ended June 30, 2012 and 2011, were (in thousands):

	2012	2011
State	$ 130,831	$ 109,448
Non-State	60,181	51,045
	$ 191,012	$ 160,493

Teachers' Retirement System

Plan Description – TRS is a multiple employer defined benefit cost sharing public employee retirement system covering all full-time employees of the 55 county public school systems in the State and certain personnel of the 13 State-supported institutions of higher education, State Department of Education and the Higher Education Policy Commission hired prior to July 1, 1991. Employees of the State-supported institutions of higher education and the Higher Education Policy commission hired after June 30, 1991, are required to participate in the Higher Education Retirement System. TRS closed membership to new hires effective July 1, 1991. However, effective July 1, 2005, all new employees hired for the first time are required to participate in TRS.

During the 2008 First Special Session, the West Virginia Legislature passed House Bill 101 regarding retirement benefits for teachers and educational service personnel which became effective Sunday, March 16, 2008. The legislation provided an

opportunity for members of the Teachers' Defined Contribution Retirement System (TDCRS) to elect to transfer to the West Virginia Teachers' Retirement System (TRS). The transfer occurred on July 1, 2008 and a total of 15,152 TDCRS members transferred to TRS.

TRS provides retirement benefits as well as death and disability benefits. A member is eligible for normal retirement at age 60 with five years of service, age 55 with 30 years of service or any age with 35 years of service. A member may retire with 30 years of credited service at any age with the pension reduced actuarially if the member retires before age 55. Terminated members with at least five, but less than 20, years of credited service who do not withdraw their accumulated contributions are entitled to a deferred retirement commencing at age 62. Retirement benefits are equivalent to 2% of average annual salary multiplied by years of service. Average salary is the average of the 5 highest fiscal years of earnings during the last 15 fiscal years of earnings.

Chapter 18, Article 7A of the West Virginia State Code assigns the authority to establish and amend the provisions of the plan to the State Legislature.

Contributions – A member who withdraws from service for any cause other than death or retirement may request that the accumulated employee contributions plus interest be refunded.

TRS funding policy provides for member contributions based on 6% of members' gross salary. Contributions as a percentage of payroll for members and employers are established by State law and are

not actuarially determined. Employers make the following contributions:

The State, county boards of education, and other employers contribute 15% of gross salary of their TRS members hired prior to July 1, 1991. The State, county boards of education, and other employers contribute 7.5% of the gross salary of their TRS covered employees hired for the first time after July 1, 2005 and for those TDCRS members who selected to transfer to TRS effective July 1, 2008. The other employers and county boards of education, utilizing funds made available through the State's School Aid Formula (SAF) contribute 7.5% of the gross salary of their TDCRS covered employees. In addition, the State contributes a certain percentage of fire insurance premiums paid by State residents to assist in extinguishing the TRS unfunded liability within 40 years of June 30, 1994. In addition, certain additional contributions of approximately $374,711,708 and $378,671,497 were made during the years ended June 30, 2012 and 2011, respectively, representing extra appropriations to pay off the unfunded liability.

Public Safety Death, Disability and Retirement System

Plan Description – PSDDRS is a single employer defined benefit public employee retirement system covering all West Virginia State Police (State Police) hired on or before March 11, 1994. This plan is closed to new entrants.

PSDDRS provides retirement benefits as well as death and disability benefits. A member is eligible for normal retirement at age 50 after 20 years of contributory service, or at any age upon completion of

25 years of service. There is no vesting in the State's contributions prior to ten years of service. Benefits payable to members retiring prior to age 50 are deferred until the normal retirement date. The annual retirement benefit is 5.5% of the members' aggregate salary, but not less than $6,000 per year. Total service related disability benefits are equal to the member's annual salary, but not less than $15,000 per year. Aggregate salary is the total salary paid to a member during his or her period of service, which may include up to 5 years of active military service credited at the average departmental salary. Aggregate salary for purposes of determining disability benefits may include salary that would have been earned had the participant served at least 25 years notwithstanding the disability. An annual cost-of-living adjustment of 3.75% is granted to retirees and beneficiaries. For service-connected total disability retirees, the adjustment begins at age 65. A member who terminates employment is entitled to a refund of his or her contributions plus interest.

Contributions – PSDDRS funding policy provides for member contributions based on 9% of their annual earnings. The State makes contributions based on 15% of the annual payroll of State Police, as well as contributing all revenue generated by the sale of traffic accident reports, criminal investigation reports and other fees. In addition, certain additional contributions of approximately $22,051,000 and $23,605,000 were made during the years ended June 30, 2012 and 2011, respectively, representing extra appropriations to pay off the unfunded liability. Contributions, as a percentage of payroll for members

and the employer, are established by State law and are not actuarially determined.

State Police Retirement System

Plan Description – SPRS is a single employer defined benefit public employee retirement system that was established for all State Police hired on or after March 12, 1994. SPRS provides retirement, death, and disability benefits. A member is eligible for normal retirement at age 50 with 25 years of service or age 52 with 20 years of credited service. A member is eligible for a reduced benefit with 20 years of credited service and retiring before age 52. The annual regular retirement benefit, paid monthly, is equal to 2.75% of the final average salary multiplied by the years of service. Final average salary is the average of the five highest calendar years of earnings during the last ten years of earnings. Annual retirement annuity adjustments are 1.0% for regular retirement and are payable on July 1 of each year after the member reaches 63 years of age.

Contributions – Members contribute 13% of annual base salary. Employer contribution rates were 17.5% and 19.5% of covered employees' annual base salary for fiscal years ending June 30, 2012 and 2011, respectively. Effective July 1, 2012 employer contribution rates will be reduced to 15.5% of members' annual earnings.

Chapter 15, Article 2 and Article 2A of the West Virginia State Code assigns the authority to establish and amend the provisions of the PSDDRS and SPRS plans to the State Legislature.

Deputy Sheriff Retirement System

Plan Description – DSRS a multiple employer defined benefit cost sharing public employee retirement system, was established for all deputy sheriffs hired by all 55 county governments on or after July 1, 1998. The DSRS was also made available to any deputy sheriff employed in covered employment participating in PERS on the effective date so long as he/she made notification in writing before January 31, 1999, to both the County Commission in the county in which he/she was employed and the Board of his/her desire to transfer to the DSRS. Approximately 600 deputy sheriffs elected such transfer and as a result, approximately $28,638,000 of accumulated member and employer contributions and interest were transferred from PERS to DSRS in fiscal year 1999, in accordance with Chapter 7, Article 14D of the West Virginia State Code.

DSRS provides retirement as well as death and disability benefits. A member is eligible for normal retirement under the following circumstances:

1. Attainment of the age of 50 years and completion of 20 or more years of service
2. Member is in covered employment, has attained the age of 60 years, and has completed five or more years of service
3. Attainment of the age of 62 years and has completed five or more years of service

The annual regular retirement benefit is equal to 2.25% of a member's final average salary multiplied by the member's years of credited service. Final average salary refers to the average of the highest annual compensation received for covered employment by the

member during any five consecutive plan years within the member's last ten years of service. A member may elect to receive retirement income payments equal to his/her accrued benefit in the normal form or in a variety of annuity options. The normal form signifies a monthly annuity which is 1/12 of the amount of a members accrued benefit which is payable for the member's life.

Benefit payments did not begin prior to January 1, 2000, except benefit payments resulting from disability.

Chapter 7, Article 14D of the West Virginia State Code assigns the authority to establish and amend the provisions of the plan to the State Legislature.

Contributions – Members contribute 8.5% of monthly base salary, and the Sheriff's Office/County Commission of the County in which the member is employed contributed an additional 13% and 10.5% of the member's monthly salary during years ended June 30, 2012 and 2011, respectively. Employer contributions will remain at 13% of the member's monthly salary during the fiscal year ending June 30, 2013. In addition, the Sheriff's Office/County Commissions contribute certain fees charged for reports and other services provided by the sheriff's offices.

Judges' Retirement System

Plan Description – JRS is a single employer defined benefit public employee retirement system covering State judges and justices who elect to participate. JRS provides retirement as well as death and disability benefits. A member who was appointed or elected to the bench prior to July 2, 2005 is eligible for normal

retirement upon the attainment of 24 years of service of which at least 12 years is as a sitting judge or justice, 16 years of service at age 65 of which at least 12 years is as a sitting judge or justice, or 8 full years of service after age 65. A member who was appointed or elected to the bench on or after July 2, 2005 is eligible for normal retirement upon the attainment of 24 years of service of which at least 14 years is as a sitting judge or justice, or 16 years of service at age 65 of which 14 years is as a sitting judge or justice. A member on the bench prior to July 2, 2005 is eligible for a deferred benefit upon termination of service prior to normal retirement provided the member completes 16 years of service of which 12 years of service is as a sitting judge or justice. A member of the bench on or after July 2, 2005 is eligible for a deferred benefit upon termination of service prior to normal retirement provided the member completes 16 years of service of which 14 years of service are as a sitting judge or justice.

The annual benefit paid to judges and justices on the bench prior to July 2, 2005 is 75% of the current annual salary of the office from which the participant retires, with surviving spouse and dependent child benefits. This benefit is proportionally increased upon increase in salary for active sitting judges and justices.

The annual benefit paid to judges and justices on the bench on or after July 2, 2005 is 75% of the member's final average salary. Final average salary means the average of the highest thirty-six consecutive month's compensation received as a judge or justice. No increases in benefits are given by virtue of increase in salary of active sitting judges or justices.

Chapter 51, Article 9 of the West Virginia State Code assigns the authority to establish and amend the provisions of the plan to the State Legislature.

Contributions – JRS funding policy provides for member contributions based on 10.5% of their annual earnings. This policy also provides for periodic employer contributions at varying amounts appropriated annually by the State Legislature. However, annual appropriations are determined in consideration of the most recent actuarial valuation. Any participant who terminates before becoming eligible for benefits may elect to withdraw his or her contributions without interest.

Emergency Medical Services Retirement System (EMSRS)

Plan Description – The EMSRS Act was passed by the Legislature in March 2007. The legislation provided for a voluntary participation election of eligible emergency medical service offices and mandated that certain participation levels be reached by December 31, 2017, in order for the provisions of the Emergency Medical Services Retirement System to become effective. At the close of the election period, fifteen licensed EMS public employers, consisting of twelve eligible Public Employees Retirement System (PERS) political subdivisions and three eligible Non-PERS political subdivisions, passed corporate resolutions to become participating public employers of this retirement system. Statewide, over five hundred eligible Emergency Medical Services Officers elected to opt into this new retirement plan. The WV Emergency Medical Services Retirement System (EMSRS) became effective January 1, 2008.

The statute prohibited any payout of benefits from the EMSRS fund prior to January 1, 2011, with the exception of duty disability retirement. An EMSRS member is eligible for "normal" retirement when one of the following occurs:

- Attainment of age 50 and the completion of 20 years of contributory service; or
- Attainment of age 50 when age plus contributory service equals 70 while still in covered employment; or
- Attainment of age 60 and completion of 10 years contributory service while still in covered employment; or
- Attainment of age 62 and completion of 5 years of contributory service.

An EMSRS member is eligible for "early retirement" when they reach age 45 and have completed 20 years of service.

Final Average Salary (FAS) is the average of the highest annual compensation received by the member during covered employment for any 5 consecutive plan years (Jan. 1–Dec. 31) within the last 10 years of service. The accrued benefit on behalf of any member is calculated as follows:

Final Average Salary x Years of Credited Service x Benefit Percentage

Annual Retirement Benefit Formula

2.75% x FAS x Years of Service for years 1–20
2.0% x FAS x Years of Service for years 21–25
1.0% x FAS x Years of Service for years 26–30

In accordance with provisions in statute, upon reaching a 75% funded level as of an actuarial valuation date, the Board shall increase the annual retirement benefit multiplier from 2.6% of final average salary to 2.75% of final average salary for years one through twenty of service credited.

Chapter 16, Article 5V of the West Virginia State Code assigns the authority to establish and amend the provisions of the plan to the State Legislature.

Contributions – Currently, the EMSRS employee contribution rate is 8.5% of gross monthly salary and the employer contribution rate is 10.5% of gross monthly salary.

Municipal Police Officers and Firefighters Retirement System (MPFRS)

Plan Description – The MPFRS Act was passed by the Legislature in November 2009, and become effective January 1, 2010. The legislation provided for any municipality or municipal subdivision employing municipal police officers or firefighters to elect to become a participating employer. MPFRS is a multiple employer defined benefit retirement system. The MPFRS had 12 participating members as of June 30, 2012. If there are fewer than 100 members on January 1, 2014, all members will be merged into the Emergency Medical Services Retirement System. All police officers and firefighters first employed in covered employment after the date the municipality or municipal subdivision elected to join MPFRS are required to be members of MPFRS.

A MPFRS member is eligible for "normal" retirement when one of the following occurs:

- Attainment of age 50 and the completion of 20 years of contributory service; or
- Attainment of age 50 when age plus contributory service equals 70 while still in covered employment; or
- Attainment of age 60 and completion of 10 years contributory service while still in covered employment; or
- Attainment of age 62 and completion of 5 years of contributory service.

Final Average Salary (FAS) is the average of the highest annual compensation received by the member during covered employment for any 5 consecutive plan years (Jan. 1–Dec. 31) within the last 10 years of service. The accrued benefit on behalf of any member is calculated as follows, not to exceed 67%:

Final Average Salary x Years of Credited Service x Benefit Percentage

Annual Retirement Benefit Formula

2.6% x FAS x Years of Credited Service for years 1–20
2.0% x FAS x Years of Credited Service for years 21–25
1.0% x FAS x Years if Credited Service for years 26–30

Chapter 8, Article 22A of the West Virginia State Code assigns the authority to establish and amend the provisions of the plan to the State Legislature.

Contributions – Currently, the MPFRS employee contribution rate is 8.5% of gross monthly salary and the employer contribution rate is 8.5% of gross

monthly salary. As provided in statute, the Board may recommend the employee contribution rate be increased to 10.5% if the MPFRS plan does not reach a 70% funded level by July 1, 2014.

Plan Membership

Membership in the above plans consisted of the following as of the plan valuation dates, July 1, 2011 and 2010:

[see next page]

As of July 1, 2011:	PERS	TRS	PSDDRS	SPRS	DSRS	JRS	EMSRS	MPFRS
Retirees and beneficiaries currently receiving benefits	22,793	31,043	689	17	272	56	20	–
Terminated members entitled to benefits but not yet receiving them	3,859	1,579	4	7	70	–	22	–
Terminated nonvested members	12,172	1,669	2	109	143	2	81	3
Active members:								
Vested	23,420	25,534	133	227	613	23	259	–
Nonvested	12,834	10,321	–	296	341	47	276	9
Total	75,078	70,146	828	656	1,439	128	658	12

As of July 1, 2010:	PERS	TRS	PSDDRS	SPRS	DSRS	JRS	EMSRS	MPFRS
Retirees and beneficiaries currently receiving benefits	22,040	30,127	684	17	260	56	–	–
Terminated members entitled to benefits but not yet receiving them	3,883	1,621	3	8	65	–	27	–
Terminated nonvested members	11,481	1,420	2	101	127	2	75	–
Active members:								
Vested	23,436	25,491	147	225	586	24	251	–
Nonvested	12,541	10,179	–	273	372	47	274	6
Total	73,381	68,838	836	624	1,410	129	627	6

Plan Funded Status and Funding Progress – Defined Benefit Pension Plans

Plan Funded Status – The funded status of each plan as of July 1, 2011 (unless otherwise noted), the most recent actuarial valuation date, is as follows (dollar amounts in thousands):

[see next page]

	Actuarial Value of Assets (a)	Actuarial Accrued Liability (AAL) Entry Age (b)	Unfunded AAL (UAAL) (b–a)	Funded Ratio (a/b)	Covered Payroll (c)	UAAL as Percentage of Covered Payroll ((b–a)/c)
PERS	$4,322,668	$5,515,252	$1,192,584	78.4%	$1,327,717	89.8%
TRS	5,074,665	9,445,148	4,370,483	53.7%	1,505,749	290.3%
PSDDRS	481,994	606,245	124,251	79.5%	8,001	1,552.9%
SPRS	70,756	79,036	8,280	89.5%	24,725	33.5%
DSRS	113,574	149,462	35,888	76.0%	42,366	84.7%
JRS	124,583	95,591	(28,992)	130.3%	8,860	0.0%
EMS	32,366	39,225	6,859	82.5%	22,488	30.5%
MPFRS	65	23	(42)	282.6%	343	(12.2)%

Plan Funding Progress – The schedules of funding progress, presented as required supplemental information (RSI) following the notes to the financial statements, present multiyear trend information about whether the actuarial values of plan assets are increasing or decreasing over time relative to the AALs for benefits. Significant exemptions used in determining funding progress are as follows:

[see next page]

	PERS	TRS	PSDDRS
Valuation date	July 1, 2011	July 1, 2011	July 1, 2011
Actuarial cost method	Entry age normal	Entry age	Entry age
Asset valuation method	4 Year Smoothing	Fair value	Fair value
Amortization method	Level dollar	Level dollar	Level dollar
Amortization period	Through FY 2035	Through FY 2034	Through FY 2024
Actuarial assumptions:			
Investment rate of return	7.5%	7.5%	7.5%
Projected salary increases:			
PERS:			
State	4.25–6.0%	–	–
Nonstate	4.25–6.0%	–	–
TRS:			
Teachers	–	3.75–5.25%	–
Non Teachers	–	3.4–6.50%	–
PSDDRS:	–	–	6.5% for first 2 yrs of service 6.0% for first 3 yrs of service 5.5% for the next 5 yrs and 4.75% thereafter
Inflation rate	3.0%	3.0%	3.0%

	SPRS	DSRS	JRS
Valuation date	July 1, 2011	July 1, 2011	July 1, 2011
Actuarial cost method	Entry age normal	Entry age normal cost-aggregate level percent of payroll	Entry age
Asset valuation method	Fair value	Fair value	Fair value
Amortization method	Level percentage of payroll payroll	Level percentage of open group payroll plus fee deposits	Level dollar
Amortization period	Through FY 2030	Through FY 2029	Not applicable
Actuarial assumptions:			
Investment rate of return	7.5%	7.5%	7.5%
Projected salary increases	6.5% for first 2 yrs of service, 6.0% for next 3 yrs of service, 5.5% for the next 5 yrs, and 4.75% thereafter	6.5% for first 2 yrs of service, 6.0% for next 3 yrs of service, 5.5% for the next 5 yrs, and 5.0% thereafter	4.5% Annual increase to benefits 4.5%
Inflation rate	3.0%	3.0%	3.0%

	EMSRS	MPFRS
Valuation date	July 1, 2011	July 1, 2011
Actuarial cost method	Entry age normal with aggregate normal cost level percentage of payroll	Entry age cost with aggregate normal cost level percent
Asset valuation method	Fair value	Fair value
Amortization method	Level dollar	Level dollar
Amortization period	Through FY 2038	Through FY 2040
Actuarial assumptions:		
Investment rate of return	7.5%	7.5%
Projected salary increases	By age from 5.0% at age 30	By age from 5.0% at age 30
	Declining to 3.5% at age 65	Declining to 3.5% at age 65
Inflation rate	3.0%	3.0%

Teachers' Defined Contribution Retirement System

Plan Description – TDCRS is a multiple employer defined contribution retirement system, which is a money purchase pension plan covering primarily full-time employees of the State's 55 county public school systems, the State Department of Education, and the Schools for the Deaf and Blind who were hired between July 1, 1991 and June 30, 2005. TDCRS members also include former TRS plan members, including higher education employees, who have elected to transfer into or participate in TDCRS. TDCRS benefits depend solely on amounts contributed to the plan plus investment earnings. Employees are eligible to participate from the date of employment. TDCRS closed participation to new members effective June 30, 2005.

During the 2008 First Special Session, the West Virginia Legislature passed House Bill 101 regarding retirement benefits for teachers and educational service personnel which became effective Sunday, March 16, 2008. The legislation provided an opportunity for members of the Teachers' Defined Contribution Retirement System (TDCRS) to elect to transfer to the West Virginia Teachers' Retirement System (TRS). The transfer occurred on July 1, 2008 and a total of 15,152 TDCRS members transferred to TRS.

The TDCRS provides members with a choice of 16 separate investment options made up of fixed income, balanced, large cap, mid cap, small cap, and international mutual funds, a money market fund and a fixed annuity.

Contributions – State law requires employees to contribute 4.5% of their gross compensation and the employers to contribute 7.5% of covered members' gross compensation. Employer contributions are comprised from amounts allocated to the employers through the State's School Aid Formula, forfeitures allotted from the TDC Plan and county contributions. Employer contributions for each employee (and interest allocated to the employee's account) become partially vested after six years and fully vested after 12 complete years of service. If a terminated employee does not return to active participant status within five years, the nonvested employer contributions and earnings thereon are forfeited to reduce the employer's current period contribution requirement. Any such forfeitures arising from contributions, plus earnings thereon, will be used to reduce future employer contributions.

3 – INVESTMENTS

The Board has adopted investment guidelines that are consistent with those specified in the West Virginia Code. Those guidelines authorize the Board to invest with IMB in obligations of the United States and certain of its agencies, certificates of deposit, direct and general obligations of states, repurchase agreements relating to certain securities, equity securities, real estate, and guaranteed investment contracts. Plan assets of defined benefit plans are invested by the IMB. Investments are managed by a third party administrator as the trustee for the TDCRS.

The IMB invests plan assets in accordance with West Virginia Code and policies established by the

IMB. Individual defined benefit plan assets are invested by the IMB in the various IMB pools. Following is a summary of investments held by IMB for each plan as of June 30, 2012 and 2011 (in thousands):

[see next page]

June 30, 2012	PERS	TRS	PSDDRS	SPRS	DSRS	JRS	EMSRS	MPOF
Large cap equity	$ 795,984	$ 908,381	$ 86,640	$14,200	$ 21,171	$ 23,121	$ 6,359	$ 32
Non-large cap equity	269,212	307,418	29,507	4,779	7,158	7,802	2,147	10
International qualified	343,311	393,701	37,412	5,717	9,036	9,901	2,593	14
International equity	742,277	851,090	82,434	13,451	19,898	21,657	6,056	27
Private equity	435,948	503,734	48,464	7,821	11,695	12,702	3,525	17
Real estate	273,496	312,255	29,722	4,829	7,273	7,928	2,177	11
Total return fixed income	612,542	632,244	68,306	11,174	16,678	17,947	5,113	25
Core fixed income	294,910	300,128	32,860	5,393	8,043	8,645	2,470	11
Hedge fund	443,916	509,625	48,974	7,950	11,851	12,917	3,579	16
TRS annuity	–	53,023	–	–	–	–	–	–
Short term fixed income	26,949	210,217	718	1,417	468	367	230	22
TIPS	113,597	129,741	12,349	2,004	3,010	3,278	904	4
Total investments	$4,352,142	$5,111,557	$477,386	$78,735	$116,281	$126,265	$35,153	$189

* * *

STATE OF WEST VIRGINIA

CERTIFICATE

I, Natalie E. Tennant, Secretary of State of the State of West Virginia, hereby certify that

the following is a true and correct copy of Senate Bill 65 as filed from the 2013 Regular Session of the West Virginia Legislature as it appears in the records of my office.

Given under my hand and the Great Seal of the State of West Virginia on ***January 13, 2015***

/s/ Natalie E. Tennant
Secretary of State

ENROLLED

Senate Bill No. 65

(BY SENATORS TUCKER, MILLER, SYPOLT AND WILLIAMS)

[Passed April 12, 2013; in effect ninety days from passage.]

AN ACT to amend and reenact §11-21-12 of the Code of West Virginia, 1931, as amended; and to amend and reenact §20-7-1 of said code, all relating to pension benefits exempt from state income taxation; and including Division of Natural Resources police into the class of law-enforcement officer exempted.

Be it enacted by the Legislature of West Virginia:

That §11-21-12 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that §20-7-1 of said code be amended and reenacted, all to read as follows:

CHAPTER 11. TAXATION.

ARTICLE 21. PERSONAL INCOME TAX.

§11-21-12. West Virginia adjusted gross income of resident individual.

(a) *General.* The West Virginia adjusted gross income of a resident individual means his or her federal adjusted gross income as defined in the laws of the United States for the taxable year with the modifications specified in this section.

(b) *Modifications increasing federal adjusted gross income.* — There shall be added to federal adjusted

gross income unless already included therein the following items:

(1) Interest income on obligations of any state other than this state or of a political subdivision of any other state unless created by compact or agreement to which this state is a party;

(2) Interest or dividend income on obligations or securities of any authority, commission or instrumentality of the United States, which the laws of the United States exempt from federal income tax but not from state income taxes;

(3) Any deduction allowed when determining federal adjusted gross income for federal income tax purposes for the taxable year that is not allowed as a deduction under this article for the taxable year;

(4) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the income from which is exempt from tax under this article, to the extent deductible in determining federal adjusted gross income;

(5) Interest on a depository institutional tax-exempt savings certificate which is allowed as an exclusion from federal gross income under Section 128 of the Internal Revenue Code, for the federal taxable year;

(6) The amount of a lump sum distribution for which the taxpayer has elected under Section 402(e) of the Internal Revenue Code of 1986, amended, to be separately taxed for federal income tax purposes; and

(7) Amounts withdrawn from a medical savings account established by or for an individual under section twenty, article fifteen, chapter thirty-three of

this code or section fifteen, article sixteen of said chapter that are used for a purpose other than payment of medical expenses, as defined in those sections.

(c) *Modifications reducing federal adjusted gross income.* — There shall be subtracted from federal adjusted gross income to the extent included therein:

(1) Interest income on obligations of the United States and its possessions to the extent includable in gross income for federal income tax purposes;

(2) Interest or dividend income on obligations or securities of any authority, commission or instrumentality of the United States or of the State of West Virginia to the extent includable in gross income for federal income tax purposes but exempt from state income taxes under the laws of the United States or of the State of West Virginia, including federal interest or dividends paid to shareholders of a regulated investment company, under Section 852 of the Internal Revenue Code for taxable years ending after June 30, 1987;

(3) Any amount included in federal adjusted gross income for federal income tax purposes for the taxable year that is not included in federal adjusted gross income under this article for the taxable year;

(4) The amount of any refund or credit for overpayment of income taxes imposed by this state, or any other taxing jurisdiction, to the extent properly included in gross income for federal income tax purposes;

(5) Annuities, retirement allowances, returns of contributions and any other benefit received under the West Virginia Public Employees Retirement System,

the West Virginia State Teachers Retirement System and all forms of military retirement, including regular armed forces, reserve and National Guard, including any survivorship annuities derived therefrom, to the extent includable in gross income for federal income tax purposes: *Provided*, That notwithstanding any provisions in this code to the contrary this modification shall be limited to the first &2,000 of benefits received under the West Virginia Public Employees Retirement System, the West Virginia State Teachers Retirement System and, including any survivorship annuities derived therefrom, to the extent includable in gross income for federal income tax purposes for taxable years beginning after December 31, 1986; and the first $2,000 of benefits received under any federal retirement system to which Title 4 U. S. C,§111 applies: *Provided, however*, That the total modification under this paragraph shall not exceed $2,000 per person receiving retirement benefits and this limitation shall apply to all returns or amended returns filed after December 31, 1988;

(6) Retirement income received in the form of pensions and annuities after December 31, 1979, under any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System, the West Virginia Deputy Sheriff Retirement System or the West Virginia Public Employees Retirement System if paid to police officers retired from the Department of Natural Resources, including those formerly classified as conservation officers, including any survivorship annuities derived from any of these

programs, to the extent includable in gross income for federal income tax purposes;

(7) (A) For taxable years begging after December 31, 2000, and ending prior to January 1, 2003, an amount equal to two percent multiplied by the number of years of active duty in the armed forces of the United States of America with the product thereof multiplied by the first $30,000 of military retirement income, including retirement income from the regular armed forces, reserve and National Guard paid by the United States or by this state after December 31, 2000, including any survivorship annuities, to the extent included in gross income for federal income tax purposes for the taxable year.

(B) For taxable years beginning after December 31, 2002, the first $20,000 of military retirement income, including retirement income from the regular armed forces, reserve and National Guard paid by the United States or by this state after December 31, 2002, including any survivorship annuities, to the extent included in gross income for federal income tax purposes for the taxable year.

(C) In the event that any of the provisions of this subdivision are found by a court of competent jurisdiction to violate either the Constitution of this state or of the United States, or is held to be extended to persons other than specified in this subdivision, this subdivision shall become null and void by operation of law.

(8) Federal adjusted gross income in the amount of $8,000 received from any source after December 31, 1986, by any person who has attained the age of sixty-five on or before the last day of the taxable year, or by

any person certified by proper authority as permanently and totally disabled, regardless of age, on or before the last day of the taxable year, to the extent includable in federal adjusted gross income for federal tax purposes: *Provided*, That if a person has a medical certification from a prior year and he or she is still permanently and totally disabled, a copy of the original certificate is acceptable as proof of disability. A copy of the form filed for the federal disability income tax exclusion is acceptable: *Provided, however*, That:

(i) Where the total modification under subdivisions (1), (2), (5), (6) and (7) of the subsection is $8,000 per person or more, no deduction shall be allowed under- this subdivision; and

(ii) Where the total modification under subdivisions (1), (2), (5), (6) and (7) of this subsection is less than $8,000 per person, the total modification allowed under this subdivision for all gross income received by that person shall be limited to the difference between $8,000 and the sum of modifications under subdivisions (1), (2), (5), (6) and (7) of this subsection;

(9) Federal adjusted gross income in the amount of $8,000 received from any source after December 31, 1986, by the surviving spouse of any person who had attained the age of sixty-five or who had been certified as permanently and totally disabled, to the extent included in federal adjusted gross income for federal tax purposes: *Provided*, That:

(i) Where the total modification under subdivisions (1), (2), (5), (6), (7) and (8) of this

subsection is $8,000 or more, no deduction shall be allowed under this subdivision; and

(ii) Where the total modification under subdivisions (1), (2), (5), (6), (7) and (8) of this subsection is less $8,000 per person, the total modification allowed under this subdivision for all gross income received by that person shall be entitled to the difference between $8,000 and the sum of subdivisions (1), (2), (5), (6), (7) and (8) of this subsection;

(10) Contributions from any source to a medical savings account established by or for the individual pursuant to section twenty, article fifteen, chapter thirty-three of this code or section fifteen, article sixteen of said chapter, plus interest earned on the account, to the extent includable in federal adjusted gross income for federal tax purposes: *Provided*,

That the amount subtracted pursuant to this subdivision for any one taxable year may not exceed $2,000 plus interest earned on the account. For married individuals filing a joint return, the maximum deduction is computed separately for each individual;

(11) For the 2006 taxable year only, severance wages received by a taxpayer from an employer as the result of the taxpayer's permanent termination from employment through a reduction in force and through no fault of the employee, not to exceed $30,000. For purposes of this subdivision:

(i) The term "severance wages" means any monetary compensation paid by the employer in the taxable year as a result of permanent termination

from employment in excess of regular annual wages or regular annual salary;

(ii) The "reduction in force" means a net reduction in the number of employers employed by the employer in West Virginia, determined based on total West Virginia employment of the employer's controlled group;

(iii) The term "controlled group" means one or more chains of corporations connected through stock ownership with a common parent corporation if stock grossing at least fifty percent of the voting power of all classes of stock of each of the corporations is owned directly or indirectly by one or more of the corporations and the common parent owns directly stock possessing at least fifty percent of the voting power of all classes of stock of at least one of the other corporations;

(iv) The term "corporation" means any corporation, joint-stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by a certificate of interest or ownership or similar written instrument; and

(12) Any other income which this state is prohibited from taxing under the laws of the United States.

(d) *Modification for West Virginia fiduciary adjustment.* — There shall be added to or subtracted from federal adjusted gross income, as the case may be, the taxpayer's share, as beneficiary of an estate or trust, of the West Virginia fiduciary adjustment determined under section nineteen of this article.

(e) *Partners and S corporation shareholders.* – The amounts of modifications required to be made under this section by a partner or an S corporation shareholder, which relate to items of income, gain —

loss or deduction of a partnership or an S corporation, shall be determined under section seventeen of this article.

(f) *Husband and wife.* — If husband and wife determine their federal income tax on a joint return but determine their West Virginia income taxes separately, they shall determine their West Virginia adjusted gross incomes separately as if their federal adjusted gross incomes had been determined separately.

(g) *Effective Date.* (1) Changes in the language of this section enacted in the year 2000 shall apply to taxable years beginning after December 31, 2000.

(2) Changes in the language of this section enacted in the year 2002 shall apply to taxable years beginning after December 31, 2002.

(3) Changes in the language of this section enacted in the year 2013 shall apply to taxable years beginning after December 31, 2013.

CHAPTER 20. NATURAL RESOURCES.

ARTICLE 7. LAW ENFORCEMENT, MOTORBOATING, LITTER.

§ 20-7-1. Chief natural resources police officer; natural resources police officers; special and emergency natural resources police officers; subsistence allowance; expenses.

(a) The division's law enforcement policies, practices and programs are under the immediate supervision and direction of the division law enforcement officer selected by the director and

designated as chief natural resources police officer as provided in section thirteen, article one of this chapter.

(b) Under the supervision of the director, the chief natural resources police officer shall organize, develop and maintain law enforcement practices, means and methods geared, timed and adjustable to seasonal, emergency and other needs and requirements of the division's comprehensive natural resources program. All division personnel detailed and assigned to law enforcement duties and services under this section shall be known and designated as natural resources police officer and are under the immediate supervision and direction of the chief natural resources police officer except as otherwise provided. All natural resources police officers shall be trained, equipped and conditioned for duty and services wherever and whenever required by division law-enforcement needs.

(c) The chief natural resources police officers, acting under supervision of the director, is authorized to select and appoint emergency natural resources police officers for a limited period for effective enforcement of the provisions of this chapter when considered necessary because of emergency or other unusual circumstances. The emergency natural resources police officers shall be selected from qualified civil service personnel of the division, except in emergency situations and circumstances when the director may designate officers, without regard to civil service requirements and qualifications, to meet law-enforcement needs. Emergency natural resources police officers shall exercise all powers and duties prescribed in section four of this article for full-time salaried natural resources police officers except the provisions of subdivision (8) of said section.

(d) The chief natural resources police officer, acting under supervision of the director, is also authorized to select and appoint as special natural resource police officers any full-time civil service employee who is assigned to, and has direct responsibility for management of, an area owned, leased or under the control of the division and who has satisfactorily completed a course of training established and administered by the chief natural resources police officer, when the action is considered necessary because of law enforcement needs. The powers and duties of a special natural resources police officer, appointed under this provision, is the same within his or her assigned area as prescribed for full-time salaried natural resources police officers. The jurisdiction of the person appointed a special natural resources police officer, under this provision, shall be limited to the division area or areas to which he or she is assigned and directly manages.

(e) The Director of the Division of Forestry is authorized to appoint and revoke Division of Forestry special natural resources police officers who are full-time civil service personnel who have satisfactorily completed a course of training as required by the Director of the Division of Forestry. The jurisdiction, powers and duties of Division of Forestry special natural resources police officers are set forth by the Director of the Division of Forestry pursuant to article three of this chapter, and articles one-a and one-b, chapter nineteen of this code.

(f) The chief natural resources police officer, with the approval of the director, has the power and authority to revoke any appointment of an emergency

natural resources police officer or of a special natural resources police officer at any time.

(g) Natural resources police officers are subject to seasonal or other assignment and detail to duty whenever and wherever required by the functions, services and needs of the division.

(h) The chief natural resources police officer shall designate the area of primary residence of each natural resources police officer, including himself or herself. Since the area of business activity of the division is actually anywhere within the territorial confines of the State of West Virginia, actual expenses incurred shall be paid whenever the duties are performed outside the area of primary assignment and still within the state.

(i) Natural resources police office shall receive, in addition to their base pay salary, a minimum monthly subsistence allowance for their required telephone service, dry cleaning or required uniforms and meal expenses while performing their regular duties in their area of primary assignment in the amount of $130 each month. This subsistence allowance does not apply to special or emergency natural resources police officers appointed under this section.

(j) After June 30, 2010, all those full-time law-enforcement officers employed by the Division of Natural Resources as conservation officers shall be titled and known as natural resources police officers. Wherever used in this code the term "conservation officer", or its plural, means "natural resources police officer", or its plural, respectively.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

/s/ [signature]
Chapman Senate Committee

/s/ [signature]
Chairman House Committee

Originated to the Senate.
In effect ninety days from passage.

/s/ [signature]
Clerk of the Senate

/s/ [signature]
Clerk of the House of Delegates

/s/ [signature]
President of the Senate

/s/ [signature]
Speaker of the House of Delegates

The within is disapproved, this the 3rd Day of May, 2013.

/s/ [signature]
Governor

STATE OF WEST VIRGINIA
OFFICE OF THE GOVERNOR
1900 KANAWHA BOULEVARD, EAST
CHARLESTON, WV 25305
(304) 556-2000

EARL RAY TOMBLIN
GOVERNOR

May 3, 2013

VIA HAND DELIVERY
The Honorable Natalie E. Tennant
Secretary of State
State Capitol
Charleston, West Virginia 25305

Dear Secretary Tennant:

Pursuant to the provisions of section fourteen, article VII of the Constitution of West Virginia, I hereby disapprove and return Enrolled Senate Bill No. 65. This bill would authorize the Division of Natural Resources police officers in the Public Employees Retirement System "PERS") to deduct their retirement income in calculating their personal income taxes. I have various concerns about providing disparate tax treatment to a very narrow class of retirees within PERS. Moreover, the bill creates a risk

that the class will be expanded through litigation to include other retirees within PERS seeking the same tax treatment.

For the aforementioned reasons, I hereby disapprove of Enrolled Senate Bill No. 65.

Sincerely,

/s/ Earl Ray Tomblin
Earl Ray Tomblin
Governor

cc: The Honorable Richard Thompson
Speaker, West Virginia House of Delegates

The Honorable Jeffrey V. Kessler
President, Senate of West Virginia

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

	)	**DOCKET**
	)	**NO.:**
	)	14-026 RPD
	)	
JAMES D. AND ELAINE F. DAWSON	)	
Petitioners,	)	
	)	
v.	)	
	)	
MATKOVICH, MARK W., as STATE TAX COMMISSIONER OF WEST VIRGINIA,	)	
	)	
Respondent	)	

OFFICIAL TRANSCRIPT OF THE EVIDENTIARY HEARING HELD ON January 23, 2015 AT 9:30 a.m., E.S.T. IN CHARLESTON, WEST VIRGINIA BASED UPON THE OFFICIAL DIGITAL AUDIO RECORDING

PRESIDING ADMINISTRATIVE LAW JUDGE:	A.M. "Fenway" Pollack Chief Administrative Law Judge

APPEARING FOR THE PETITIONER:

COUNSEL:	**David R. Pogue, Esq.**
REPRESENTATIVE(S):	**NONE**
WITNESS(ES):	**James D. Dawson, Retired U.S. Marshal and West Virginia Deputy Sheriff**

		Direct	*Cross*	*Redirect*	*Recross*	*Judge*
Name:	James D. Dawson	10	28	—	—	—
Title:	Retired U.S. Marshal and West Virginia Deputy Sheriff					

EXHIBITS:		*Marked*	*Received*
No. 1	Payroll Records	14	14
No. 2	Social Security Statement	15	15
No. 3	Federal Wage and Tax Statements	17	17
No. 4	Retirement Certification	18	18
No. 5	Retirement Benefit Packet	19	19
No. 6	10/24/13 Dawson Letter to Tax Department	20	21
No. 7	2010 Amended West Virginia Form IT-140	21	21
No. 8	2011 Amended West Virginia Form IT-140	23	23
No. 9	11/15/13 Tax Department Letter to Dawsons	24	24
No. 10	11/15/13 Return Change, Tax Year 2010	24	25

No. 11	11/15/13 Return Change, Tax Year 2010	26	26
No. 12	9/24/14 Hearing Transcript	41	41
No. 13	10/22/14 Hearing Transcript	41	41
No. 14	*Dodson v. Palmer* decision	41	42
No. 15	Redacted the Office of Tax Appeals Decisions	43	43

APPEARING FOR THE RESPONDENT:

COUNSEL: Katherine A. Schultz, Esq, Senior Deputy Attorney General

L. Wayne Williams, Esq. Assistant Attorney General

Timothy S. Waggoner, Esq. Staff Attorney

TAX COMMISSIONER'S REPRESENTATIVE(S): NONE

WITNESS(ES): Teresa Miller, CPRB Deputy Director

		Direct	*Cross*	*Redirect*	*Recross*	*Judge*
Name:	Teresa Miller	45	68	—	—	—
Title:	CPRB Deputy Director					

EXHIBITS:		*Marked*	*Received*
No. 1	Summary Sheet	47	50
No. 2	Summary Sheet	54	54
No. 3	Summary Sheet	56	56

No. 4	**Annual Report 2010/2011**	58	58
No. 5	**Annual Report 2011/2012**	63	64
No. 6	**Copy of West Virginia Senate Bill 65 and Certificate**	73	74
No. 7	**Governor's Veto Message**	74	74

JOINT EXHIBITS:	*Marked*	*Received*

NONE

* * *

violative of the law. And so we're here to show this court that the class here, the magnitude is even smaller, and therefore, we're squarely within *Brown v. Mierke*. And so, the refund should be denied.

JUDGE POLLACK: Okay. All right. Well, go ahead and call your first witness.

ATTORNEY POGUE: My first and only witness that I'm aware of Mr. Jim Dawson, right here.

JUDGE POLLACK: Okay. Mr. Dawson, would you raise your right hand, please?

MR. DAWSON: Yes.

JAMES D. DAWSON, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

JUDGE POLLACK: Okay. Here's what we're going to do. Mr. Williams, why don't you give Mr. Dawson your mic?

ATTORNEY WILLIAMS: Certainly.

JUDGE POLLACK: So that both Mr. Pogue and Mr. Dawson have their own mics? You know, budget cuts. We can't afford any more mics.

OFF RECORD DISCUSSION

JUDGE POLLACK: All right. Go ahead.

ATTORNEY POGUE: Okay. Mr. Dawson, could you please just State your full name for the record?

MR. DAWSON: For the record, my name is James D. Dawson.

ATTORNEY POGUE: How old are you?

MR. DAWSON: I'm 60 years old.

ATTORNEY POGUE: Okay. Where do you live?

MR. DAWSON: I live in Princeton, West Virginia.

ATTORNEY POGUE: And how long have you lived there?

MR. DAWSON: Since 1987.

ATTORNEY POGUE: Are you married?

MR. DAWSON: I am.

ATTORNEY POGUE: Who is your wife?

MR. DAWSON: Elaine Dawson.

ATTORNEY POGUE: Is she sitting right next to you, right now?

MR. DAWSON: She is.

ATTORNEY POGUE: Okay. Do you and your file your taxes jointly?

MR. DAWSON: We do.

ATTORNEY POGUE: Did you file your taxes jointly for the years 2010 and 2011?

MR. DAWSON: Yes, sir.

ATTORNEY POGUE: And at some point, you were employed as a West Virginia deputy sheriff; correct?

MR. DAWSON: Correct.

ATTORNEY POGUE: Where were you a West Virginia deputy sheriff?

MR. DAWSON: Nicholas County, West Virginia.

ATTORNEY POGUE: And how long?

MR. DAWSON: I started working there in 1976 and left there in 1987.

ATTORNEY POGUE: And you were also employed in the U.S. Marshals Service; correct?

MR. DAWSON: Correct.

ATTORNEY POGUE: What years were you employed in the U.S. Marshals Service?

MR. DAWSON: 1987 through to 2008, at which time, I retired.

ATTORNEY POGUE: Okay. Were you a deputy marshal during part of that service?

MR. DAWSON: Yes. I was — the first 15 years, I was deputy supervisor, chief deputy. And then my last six years, I was appointed — presidentially appointed U.S. Marshal.

ATTORNEY POGUE: Okay. And where in the State were you primarily operating, when you were a U.S. Marshal?

MR. DAWSON: Well, while I was the appointed marshal, I was the marshal for the Southern District of West Virginia.

ATTORNEY POGUE: Okay. What about when you were a deputy marshal?

MR. DAWSON: I was assigned to the Southern District of West Virginia.

ATTORNEY POGUE: Now, tell us a little bit about your duties when you were a West Virginia deputy sheriff?

MR. DAWSON: Well, as a deputy sheriff, of course, you're tasked with crimes that are committed against

the State of West Virginia. And you were obligated to execute the warrants and orders of both the magistrate and circuit courts of that time. And that could be a wide variety of crimes against persons or property. You made arrests, fugitive warrants, fugitive from justice warrants, assault warrants. Just any crime that is a criminal offense that is within the West Virginia State Criminal Code, we were pretty much obligated and had the authority to investigate.

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ATTORNEY POGUE: Okay. Now, tell us about your duties. Let's start with your duties as a deputy U.S. Marshal?

MR. DAWSON: Well, the deputy U.S. Marshal, — and of course, actually as the U.S. Marshal, both, you are tasked with, again, executing the warrants and orders that were sent down from the circuit courts or district courts — U.S. district courts and magistrate courts within the Southern District of West Virginia. And, actually, from any U.S. court in the land that was sent to you, you could execute those, as well.

Also pursuant to West Virginia law, we were recognized as law enforcement officers and through West Virginia statute, we were given the authority to make arrests for crimes that were State crimes in the State that were felony State crimes. And we also had a U.S. Marshal Violent Criminal Fugitive Task Force in which we adopted State, and federal — or State, federal and local cases to help them apprehend various criminals that violated State offenses.

ATTORNEY POGUE: In your employment with the United States Marshals Service, did you ever work in

conjunction with State law enforcement — or local enforcement?

MR. DAWSON: Oh, all the time. They were part of the fugitive task force that was operated by the U.S. Marshals Service. And so, we would adopt State cases for the purposes of helping them track them down, because it was easier for us. We had more resources and, of course, we could cross jurisdictional boundaries to assist them, as well, in doing that. And also they had officers that were assigned to the U.S. Attorney's office. They made cases and then we were tasked with — on indictments, to track these people down, as well as DEA cases after ten days, became our responsibility to apprehend those criminals, as well.

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ATTORNEY POGUE: Okay. Now, when you were a deputy sheriff for Nicholas County, did you participate in Social Security?

MR. DAWSON: Yes, sir.

OFF RECORD DISCUSSION

JUDGE POLLACK: Okay, I'm being handed a large pile of Sheriff Nicholas County payroll records payroll records; correct?

ATTORNEY POGUE: Yes.

JUDGE POLLACK: Approximately, how many pages? Do you know?

ATTORNEY POGUE: I'm not sure.

JUDGE POLLACK: It doesn't matter. Okay, I'm marking this as Petitioner's Exhibit One. And I —.

ATTORNEY POGUE: Thank you.

JUDGE POLLACK: I presume Tax Commissioner's Counsel have seen these documents previously?

ATTORNEY WILLIAMS: These are the same documents you had at the previous hearing; correct?

ATTORNEY POGUE: Yes.

ATTORNEY WILLIAMS: We have them.

JUDGE POLLACK: Any objection to their admission?

ATTORNEY WILLIAMS: No objection to these being admitted in the record.

JUDGE POLLACK: Okay. Petitioner's Exhibit One is admitted.

ATTORNEY POGUE: Okay. Mr. Dawson, do you recognize this document?

MR. DAWSON: Yes, sir, I do.

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ATTORNEY POGUE: Okay. Can you just briefly tell us what it is?

MR. DAWSON: It is the portion of my paychecks that was attached to it, that we took off and kept. And it lists all the withholdings that came out of our paychecks, while I was there as a deputy sheriff, working for the Sheriff's Department.

ATTORNEY POGUE: Okay. Do these documents show deductions for Social Security?

MR. DAWSON: Yes, sir, they do.

ATTORNEY POGUE: Can you show us where?

MR. DAWSON: The fourth line down, where it says FICA deduction. And then, just to the left where it says FICA deduction, is a monetary amount —

ATTORNEY POGUE: Sure —.

MR. DAWSON: — placed in there that shows —.

ATTORNEY POGUE: And I'm not going to make you go through all of these right now. But to your knowledge, does that deduction appear on each one of these paystubs?

MR. DAWSON: To my knowledge, it does.

ATTORNEY POGUE: Okay. That's all for that one.

JUDGE POLLACK: Okay. I am being handed a Social Security Statement for James D. Dawson, which I'm marking as Petitioner's Exhibit Two. Has the Tax Commissioner seen that exhibit previously?

ATTORNEY WILLIAMS: Was this exhibit part of the previous record?

ATTORNEY POGUE: Yes. This is one of the ones we introduced at the summary judgment hearing.

ATTORNEY WILLIAMS: Okay. No objection to it coming into the record.

JUDGE POLLACK: Okay. Petitioner's Exhibit Two is admitted.

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ATTORNEY POGUE: Mr. Dawson, you've been handed Exhibit Two. Can you just tell us briefly what this is?

MR. DAWSON: Yes, sir. This is a Social Security Statement that is mine. It was submitted to me on September 2nd, 2010.

ATTORNEY POGUE: Does this document indicate —?

JUDGE POLLACK: Off —.

BRIEF INTERRUPTION

JUDGE POLLACK: I'm sorry to interrupt. The computer paused itself for a second. But we are back to the extent — I can't tell if it stopped. It looked like it did. To the extent we had a brief break in the recording, we're back on the record. And I would ask you to repeat your last question.

ATTORNEY POGUE: Sure. Can you tell us what this document is?

MR. DAWSON: Yes, sir, I can. It is a Social Security Statement that is issued to me, James D. Dawson, on September 2nd — it's dated September 2nd, 2010.

ATTORNEY POGUE: And just for clarity of the record, in case we missed it, he's referring to Exhibit Number Two. Does this document indicate that you paid Social Security taxes while you were a deputy sheriff?

MR. DAWSON: Yes, sir. It reflects Social Security payments during the years in which I was a deputy sheriff.

ATTORNEY POGUE: Okay. And what years are those?

MR. DAWSON: Well, beginning in 1976, that'll be part of those years. Part of that will be from June on. The earlier part will be when I was in the military and a construction

worker after I got out the military and then from June of 1976 all the way down through March of 1987.

ATTORNEY POGUE: And just for the record —.

MR. DAWSON: So about 11 years.

ATTORNEY POGUE: Just for the record, you're referring to page three of this exhibit; correct?

MR. DAWSON: Yes, sir.

ATTORNEY POGUE: Okay. That's all for that.

JUDGE POLLACK: Okay. Now, I've been handed what appear to be federal tax W-2s and other wage and tax Statements; correct, —

ATTORNEY POGUE: Correct.

JUDGE POLLACK: — for Mr. Dawson, which I am marking these Petitioner's Exhibit Three.

ATTORNEY WILLIAMS: No objection to this being admitted.

JUDGE POLLACK: Okay.

ATTORNEY POGUE: Mr. Dawson, can you identify Exhibit Three for us?

MR. DAWSON: Yes, sir, I can.

ATTORNEY POGUE: Just tell us what it is, briefly?

MR. DAWSON: It is a W-2 Wage and Tax Statement issued from the Nicholas County Commission, Summersville, West Virginia, to me, James D. Dawson. And it reflects the amounts and withholdings that I was paid while I was a deputy sheriff for each of those years, reflected on this page.

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ATTORNEY POGUE: Okay. Do these documents show withholdings for Social Security?

MR. DAWSON: Yes, sir. They do.

ATTORNEY POGUE: Okay. Can you tell us where — and I apologize, I know some of these are very difficult to read. We do have the originals, if anyone wants to see them. But for the ones on here, that you can read, can you show us where it shows Social Security?

MR. DAWSON: Yes, sir. The one that's dated for 1979, if you go to box 11, it is stated there the amount that was withheld. The next one under it is, again, in box 11. And —.

ATTORNEY POGUE: You don't need to go through all of them, but is it your understanding that a deduction for Social Security appears on each one of these W-2s?

MR. DAWSON: Yes, sir.

ATTORNEY POGUE: Okay. When did you retire from the United States Marshals Service?

MR. DAWSON: The last day of March, 2008.

JUDGE POLLACK: Now, I've been handed a certification regarding Mr. Dawson's retirement; correct?

ATTORNEY POGUE: Correct.

JUDGE POLLACK: Which I am marking as Petitioner's Exhibit Four.

ATTORNEY WILLIAMS: No objection.

JUDGE POLLACK: Okay. Petitioner's Exhibit Four is admitted.

ATTORNEY POGUE: Mr. Dawson, do you recognize Exhibit Four?

MR. DAWSON: Yes, sir, I do.

ATTORNEY POGUE: Can you briefly just tell us what it is?

MR. DAWSON: This is a photocopy of my original retirement credentials that was issued to me upon my retirement in 2008. And this reflects that I am a retired U.S. Marshal and it states that as a U.S. Marshal, I was a duly commissioned federal law enforcement officer of the United States Marshal Service, who was authorized to carry firearms, execute warrants, make arrests for offenses against the United States of America and to perform other law enforcement duties as authorized by law.

ATTORNEY POGUE: Thank you. Mr. Dawson, what federal retirement system were you enrolled in?

MR. DAWSON: I was enrolled under the Federal Employees Retirement System, also known as FERS.

JUDGE POLLACK: Okay. Now we have a federal retirement's benefit packet. I presume it involves FERS. And I'm marking that as Petitioner's Exhibit Five.

ATTORNEY WILLIAMS: No objection to this being admitted.

JUDGE POLLACK: Okay. Thank you. Petitioner's Exhibit Five is admitted.

ATTORNEY POGUE: Mr. Dawson, can you briefly identify this document for us?

MR. DAWSON: Yes. I can. This is a photocopy of my retired benefits booklet that is issued to me at the time that I retired from the U.S. Marshal Service. And it sets forth the benefits and various different items that reflect what they would be upon my retirement.

JUDGE POLLACK: And does this document indicate what retirement system you're in?

MR. DAWSON: Yes, sir, it does.

ATTORNEY POGUE: Can you just show us where?

MR. DAWSON: Well, it's marked as page 2 of 28.

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ATTORNEY POGUE: Just for the record, it's actually the third page of the document. But it's marked as page 2 of 28.

JUDGE POLLACK: Okay.

MR. DAWSON: And it states on that page that the retirement system, which I'm under, they call it FERS, which is the short for the Federal Employees Retirement System.

ATTORNEY POGUE: Okay. Now at some point, Mr. Dawson, you attempted to exempt your federal retirement income from State taxation under West Virginia Code 11-21-12(c)(6); correct?

MR. DAWSON: That's correct.

ATTORNEY POGUE: When was that?

MR. DAWSON: Well, I sent in two, for the 2010, 2011, amended forms and to have amended to reflect that exemption for that particular code that you just cited.

ATTORNEY POGUE: Why did you believe you were entitled to that exemption?

MR. DAWSON: Well, I did that pursuant to the Monongalia County, West Virginia case, ***Palmer — Dobson versus Palmer***. It was Judge Stone's case, in which he ruled in that that the ***Davis v. Michigan*** was the deciding case, and pursuant to that, other federal

law enforcement officers had filed. And I knew there was other federal law enforcements that were granted that exemption, so I filed it.

ATTORNEY POGUE: Okay.

JUDGE POLLACK: Okay. Now, I've been given a letter from Mr. Dawson to the West Virginia State Tax Department dated October 24, 2013. I'm marking that as Petitioner's Exhibit Six.

ATTORNEY WILLIAMS: No objection.

JUDGE POLLACK: Okay. Thank you. So Petitioner's Exhibit Six is admitted.

ATTORNEY POGUE: Mr. Dawson, you've been handed Exhibit Six, can you please tell us what that document is?

JUDGE POLLACK: It is a letter that I sent to the West Virginia State Department, dated October 24, 2013, explaining to them that I sent in the forms and what — who I had talked to, even within the Tax Department, and what my purpose was for sending them in, more or less.

ATTORNEY POGUE: Okay.

JUDGE POLLACK: Okay. Now I've been given a West Virginia Form IT-140 for tax year —. Just tax year 2010?

ATTORNEY POGUE: This one is just 2010, yes.

JUDGE POLLACK: Okay. For Mr. and Mrs. Dawson. And I'm marking that as Petitioner's Exhibit Seven.

ATTORNEY WILLIAMS: I believe that technically this would be classified as an amended return, because

that's the box that Mr. Dawson checked on the front page. And so we have no objection to the amended return being admitted into the record for 2010.

JUDGE POLLACK: Petitioner's Exhibit Seven is admitted.

ATTORNEY POGUE: Okay. Now, Mr. Dawson, you've been handed Exhibit Seven. Could you just briefly identify it?

MR. DAWSON: Yes, sir. It is a 2010 Form IT-140. It is a West Virginia Income Tax Return. And it is an amended return.

ATTORNEY POGUE: Is this the document you sent in, claiming the exemption under 11-21-12(c)(6) for the year 2010?

MR. DAWSON: Yes, sir, it is.

ATTORNEY POGUE: Okay.

OFF RECORD DISCUSSION

ATTORNEY POGUE: Can you show me where on this document, it shows the amount you were trying to exempt?

MR. DAWSON: Yes. If you will go to the third page back listed as Schedule M and go down to Line 36, that is the — my income, my retirement income, for being a U.S. Marshal.

ATTORNEY POGUE: Okay.

MR. DAWSON: And that's what I listed on that line as being what I believe to be an exempted amount.

ATTORNEY POGUE: Can you show us where on this document it shows the amount of taxes that you paid, that you were trying to recover?

MR. DAWSON: Yes, sir. If you will go to the second page of the IT-140 and go down to line 16, it states that I paid $2,440. They refunded $286 of that, which left a balance of $2,174 that I was attempting to have returned to me.

ATTORNEY POGUE: And does that amount represent State income tax that you paid on your federal law enforcement officer retirement income for 2010?

MR. DAWSON: Yes. The $2,440 is what I — was withheld and paid to the State.

ATTORNEY POGUE: But the $2,174 is what ultimately —?

MR. DAWSON: Is the balance that I was trying to get back.

ATTORNEY POGUE: Okay.

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JUDGE POLLACK: Okay. Thank you. Now I've been given an IT-140 for tax year 2011 for Mr. and Mrs. Dawson, which I presumed is also amended?

ATTORNEY POGUE: Excuse me. I don't mean to interrupt. I actually gave you my copy. I've written on that. Can I trade you?

JUDGE POLLACK: Sure. So I'm marking this as Petitioner's Exhibit Eight.

ATTORNEY WILLIAMS: No objection.

JUDGE POLLACK: Okay. Petitioner's Exhibit Eight is admitted.

ATTORNEY POGUE: Mr. Dawson, you've been handed Exhibit Number Eight. Can you please identify that for us?

MR. DAWSON: Yes, sir. It is an IT-140, a West Virginia Personal Income Tax Return, for the year of 2011. It is an amended return and it possesses information with my name on it. It's just a copy of the same one that I submitted to the State Tax Department.

ATTORNEY POGUE: Okay. Can you show us where on this document it shows the amount you were trying to exempt?

MR. DAWSON: Yes, sir, again, if you will go to Schedule M, which is the third page back, line 36, it reflects the amount of what my income was as a U.S. Marshal.

ATTORNEY POGUE: Okay. And can you show us where on this document it shows the amount of taxes you've paid, that you were attempting to recover?

MR. DAWSON: Yes, sir. On line 15, the amount paid was $2,400. Overpayment was $289, they gave me back on the original return. I was attempting to gain back $2,111.

ATTORNEY POGUE: Okay. That's all for that exhibit. Mr. Dawson, what was the result of your attempt to claim these exemptions for 2010 and 2011?

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MR. DAWSON: Well, it was denied. And I was notified by letter along with some further documents with the figures that they outline on what they — what was on the original. And I think what's on the amended and what they believe and what I believe, so —. And so they sent me that and also in the instructions that if I wanted to appeal it, it told you within so many days. And it gives you the — I suppose

you call it a petition to fill out to send — submit back to the Office of Tax Appeals.

ATTORNEY POGUE: Okay.

JUDGE POLLACK: Okay. Now I've been given a letter to Mr. and Mrs. Dawson from the Tax Department, dated November 15, 2013. I'm marking that as Petitioner's Exhibit Nine.

ATTORNEY POGUE: Mr. Dawson, you've been handed Exhibit Nine. Is this the letter you received from the Tax Department denying your claim for the exemption?

MR. DAWSON: Yes, sir. It is.

ATTORNEY POGUE: And does this letter refer to both your 2010 and 2011 taxes?

MR. DAWSON: Yes, sir, it does.

JUDGE POLLACK: And any objection to —?

ATTORNEY WILLIAMS: No objection to this document being admitted into the record.

JUDGE POLLACK: Petitioner's Exhibit Nine is admitted. Okay. Now, we have a return change from the Tax Department, issued to Mr. and Mrs. Dawson on November 15, 2013.

ATTORNEY WILLIAMS: No objection to that being admitted.

JUDGE POLLACK: Okay. And that will be Petitioner's Exhibit Ten.

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ATTORNEY POGUE: Okay. Mr. Dawson, you've been handed Exhibit Ten. Do you recognize this document?

MR. DAWSON: Yes, sir, I do. It was from the West Virginia State Tax Department. And it's titled Reference Return Change. And it's dated period 12/31/2010 at the top. It was issued to me on November 15th, 2013.

ATTORNEY POGUE: Okay.

JUDGE POLLACK: And I'm sorry, I don't think I said Petitioner's Exhibit Ten is admitted.

ATTORNEY POGUE: Thank you. Are there any mistakes on this document, to your knowledge?

MR. DAWSON: Yes, sir, there is.

ATTORNEY POGUE: Can you show us what that is?

MR. DAWSON: Well, on the front, it says the amount of the —. I'm sorry. On the very front of the page, the bottom line, it says the amount of the refund due to you has changed $4,614. Well, that's not correct. That's not at all what I was supposed to get back for that. And I think that's probably pursuant to some — they probably improperly added something on the back here.

ATTORNEY POGUE: What was the amount that you were reporting, that you were entitled to get back?

MR. DAWSON: Well, that was for the 2010 —?

ATTORNEY POGUE: Yes.

MR. DAWSON: That would have been — well, it should have been $2,174.

ATTORNEY POGUE: So just for the record, you were not ever trying to say that the government owed you $4,614?

MR. DAWSON: Not from my 2010 or even the other one. It's — no. What I submitted here is the figures I sent in. That's what I'm — felt that I was entitled to receive back.

ATTORNEY POGUE: Sure. Okay.

MR. DAWSON: And I did call about this to a person, to let them know that it was wrong. I talked to a lady and told her it was just, I'm sure, a boo-boo, and they could fix it.

JUDGE POLLACK: Now we have another return change issued to the Dawsons on the same day, November 15, 2013. But presumably regarding tax year 2011?

ATTORNEY POGUE: Correct.

JUDGE POLLACK: And I'm marking that as Petitioner's Exhibit 11.

ATTORNEY WILLIAMS: No objection to that being admitted.

JUDGE POLLACK: Okay. Petitioner's Exhibit 11 is admitted.

ATTORNEY POGUE: Mr. Dawson, could you just briefly identify for us what Petitioner's Exhibit 11 is?

MR. DAWSON: Yes, sir. It's a letter from the West Virginia State Tax Department, addressed to myself and my wife, Ms. Dawson. And it references a return change, and it sets forth the figures that have been submitted for my amended return and what they computed on it, as well.

ATTORNEY POGUE: Okay. Now, unlike the one of these for 2010, does Exhibit 11 accurately reflect the amount of taxes you believe you were owed for 2011?

MR. DAWSON: Yes, sir, it does.

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ATTORNEY POGUE: Okay. And just for the record, this document does not allow you that exemption; correct?

MR. DAWSON: No. That's just their outline of what they believe the change is to be, and that's what they submitted to me.

ATTORNEY POGUE: Okay. Now, Mr. Dawson, do you know of any other federal law enforcement officers who have been granted the exemption in 11-21-12(c)(6)?

MR. DAWSON: Several.

ATTORNEY POGUE: Okay. And what is your understanding of why they were granted the exemption and you were not?

MR. DAWSON: Well, it appears in reading now some of the redacted versions that's been submitted by the Office of Tax Appeals, is that they read Judge Stone's Order to be that if you paid into Social Security, as we did in FERS, that you weren't entitled to it. Like the gentleman and the ladies did, that were under the CSRS program, that were — who did the same exact job, it's just that he stated in there that it was his belief that probably the legislation did that because they couldn't draw Social Security income upon retirement.

ATTORNEY POGUE: And just — I know you've already testified to this, but just one more time for the record? When you were a West Virginia Deputy Sheriff, you did pay into Social Security, correct?

MR. DAWSON: Yes, sir.

ATTORNEY POGUE: I have no further questions. Pass the witness.

JUDGE POLLACK: Okay. Mr. Williams?

ATTORNEY WILLIAMS: Okay. Thank you. Thank you. Mr. Dawson, let me ask you this while I'm thinking about it, when you filed your original return with the Tax Department for 2010, —

MR. DAWSON: Yes, sir?

ATTORNEY WILLIAMS: — did you claim the exemption for $2,000?

MR. DAWSON: Correct.

ATTORNEY WILLIAMS: And that was the exemption available to any federal retiree?

MR. DAWSON: Correct.

ATTORNEY WILLIAMS: And again, on 2011, you claimed the $2,000 exemption; correct?

MR. DAWSON: That's correct.

ATTORNEY WILLIAMS: Now, on both of those years were you given credit for that exemption?

MR. DAWSON: Yes. That's why I got the —.

ATTORNEY WILLIAMS: That was honored both years?

MR. DAWSON: It was.

ATTORNEY WILLIAMS: And you received that exemption?

MR. DAWSON: I did.

ATTORNEY WILLIAMS: And if I understand your argument correctly, what we're arguing about here is

the remainder of the income that you received from your pension as a retired United States Marshal?

MR. DAWSON: Not the income received —. The tax return, other words, I'm saying —. Oh, I see what you're saying, —

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ATTORNEY WILLIAMS: Yes.

MR. DAWSON: — I apologize.

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: Did it get it right? I felt that it — according to that, case submitted there, that it should have encompassed the entire amount and not just —

ATTORNEY WILLIAMS: Not just the $2,000?

MR. DAWSON: — all but $2,000. Right.

ATTORNEY WILLIAMS: You believe that your entire retirement income should be exempt from tax? Not just the $2,000?

MR. DAWSON: Correct.

ATTORNEY WILLIAMS: Okay. Thank you. I just have a few questions I'd like to ask you. And I believe you may have most of this before. But you did work for the Nicholas County Sheriff's Department; correct?

MR. DAWSON: That is correct.

ATTORNEY WILLIAMS: And when did you say you left?

MR. DAWSON: I left in 1987.

ATTORNEY WILLIAMS: And when you left, you began working at — you went straight from there to the United States Marshal's Service; correct?

MR. DAWSON: That's correct.

ATTORNEY WILLIAMS: Now, I assume you did that because you felt it would be a better —.

JUDGE POLLACK: I'm sorry, Mr. Williams. Bear with me a sec, here.

ATTORNEY WILLIAMS: Okay.

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BRIEF INTERRUPTION

ATTORNEY WILLIAMS: And I assume you made that decision to leave because you felt it would be a better job at the United States Marshals Service and you'd have better job and career opportunities?

MR. DAWSON: Well, I felt that I would probably be more satisfied being a U.S. Marshal or deputy U.S. Marshal, more so than as a deputy sheriff.

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: So I took the job.

ATTORNEY WILLIAMS: Now, do you receive a pension from the Nicholas County Sheriff's Office?

MR. DAWSON: No.

ATTORNEY WILLIAMS: And I believe you testified that you retired from the United States Marshal Service in 2008?

MR. DAWSON: Correct.

ATTORNEY WILLIAMS: And I think, according to your retirement booklet, that you had 25 years of service?

MR. DAWSON: Correct.

ATTORNEY WILLIAMS: And I think that included four years of military service in that?

MR. DAWSON: Yes, sir.

ATTORNEY WILLIAMS: Now, I think that the factors that determine what a person receives in a pension, the primary — the two primary factors, the first being the salary that you earn during your working career; is that correct?

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MR. DAWSON: You mean that they base your retirement off of?

ATTORNEY WILLIAMS: Yes.

MR. DAWSON: They take your highest three years.

ATTORNEY WILLIAMS: Your highest three years?

MR. DAWSON: That's it. It's not your total salary over the whole thing. It's just your highest three years.

ATTORNEY WILLIAMS: During the 25 that you had in service?

MR. DAWSON: Correct.

ATTORNEY WILLIAMS: Okay. And that's the highest average salary during any three-year period?

MR. DAWSON: Right. Which is normally your last three years.

ATTORNEY WILLIAMS: Right, —.

MR. DAWSON: It was for me. It was my last three years, obviously.

ATTORNEY WILLIAMS: I understand. And the other factor is the number of years of service you have with the federal government?

MR. DAWSON: That is correct.

ATTORNEY WILLIAMS: Do you know of any other significant factors that would affect the pension income that you woul0d receive? Or would it be primarily those two?

MR. DAWSON: Well, that's what they base your overall off of. That's how they come to the figure of your pension.

ATTORNEY WILLIAMS: Okay. Okay. That's what I thought, that, it was basically just those two factors?

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MR. DAWSON: Right. And then when you reach a certain age, they take part of your pension away from you.

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: Social Security comes in.

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: Because our pension is greatly reduced from the guides under CSRS is. It's —.

ATTORNEY WILLIAMS: Understand. Understand. You're in a totally different retirement system from the federal government than CSRS?

MR. DAWSON: Right. Our percentages that they use are much less for a FERS than they are for CSRS guys.

ATTORNEY WILLIAMS: Okay. Percentages of contributions you make into the pension —?

MR. DAWSON: Well, contributions. But like the CSRS guys would get — say, they put 20 years in and at age 50 they retire, they get 50 percent.

ATTORNEY WILLIAMS: Like the military?

MR. DAWSON: We get 34.

ATTORNEY WILLIAMS: Okay. Now, let me ask you this question about the FERS retirement system —

MR. DAWSON: Yes.

ATTORNEY WILLIAMS: — that you are in? Does your pension plan include a cost of living adjustment?

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MR. DAWSON: You get cost of living adjustments, say, if Social Security gets one, you get one. But again, now, don't confuse that with the same cost of living that CSRS guys get.

ATTORNEY WILLIAMS: Right.

MR. DAWSON: Okay? Totally different. If they get —.

ATTORNEY WILLIAMS: But you do get a cost of living adjustment?

MR. DAWSON: They call it a consumer something index or something. Other words, if those guys get four percent, we're only going to get three.

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: They always bump us down. We don't get what they get. We don't get the retirement they get. We don't get the raises they get.

ATTORNEY WILLIAMS: Okay. Now, let me ask you this question, when you began your career as a United States Marshal, —

MR. DAWSON: Yes.

ATTORNEY WILLIAMS: — could you tell me what the entry level position was? Would that be like a — I

think, now, it would be a GS-7? Does that sound about right?

MR. DAWSON: Well, factors went into that. Okay?

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: When I came in, okay, we were bumped out at age 55. You had to get in —.

ATTORNEY WILLIAMS: Bumped out, you mean —?

MR. DAWSON: At age 55, you were mandatoried out.

ATTORNEY WILLIAMS: Okay. Had to retire?

MR. DAWSON: And they extended it two years. Okay.

ATTORNEY WILLIAMS: All right.

MR. DAWSON: Then, you came in —. When I came in, you either came in at a GS-5 or a GS-7. And it depended on your experience, as to which one of those that you received.

ATTORNEY WILLIAMS: Okay. And I think there were periodic raises and promotions that you would receive in the U.S. Marshals Service; if you earned them?

MR. DAWSON: If you earned them, yes. And step increases, like —.

ATTORNEY WILLIAMS: Now, what's a step increase?

MR. DAWSON: Okay. Like, one year later, you may get a raise, okay?

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: And but then they started stretching out. You had to stay in so many years. Now, as far as promotions go, those are all meritoriously done and that is not an automatic thing. That is the Merit Promotion Board decides. If you apply for a promotion, they review it, they decide whether you get it or not. It's not an automatic, you know, —.

ATTORNEY WILLIAMS: Okay. But there was the opportunity for promotion and pay raises within the U.S. Marshals Service, if you earned them?

MR. DAWSON: If you earned them, yes.

ATTORNEY WILLIAMS: Okay. Now, I think you've testified earlier that your highest three-year average salary is the basis for computing your pension; correct?

MR. DAWSON: They take your highest three. Right.

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ATTORNEY WILLIAMS: And I believe in your retirement booklet, it stated that your highest three-year-average was $134,244? Is that correct?

MR. DAWSON: That's correct.

ATTORNEY WILLIAMS: And let me ask you this question, taking a look at your retirement booklet, I believe that your initial gross monthly pension would be $3,926 per month?

MR. DAWSON: That's correct.

ATTORNEY WILLIAMS: And that was when you retired, and I think those payments began July of 2008?

MR. DAWSON: Yes.

ATTORNEY WILLIAMS: Now, you also have on there something called a FERS annuity supplement?

MR. DAWSON: Correct.

ATTORNEY WILLIAMS: Can you tell me what that is?

MR. DAWSON: I certainly can. As a matter of fact, I'll read it to you, so you get it exactly right for the record.

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: The FERS annuity supplement. Because you retire under FERS, but are not yet eligible for Social Security retirement benefits, you will receive a FERS annuity supplement of $801 in addition to your monthly annuity benefits shown above. The benefit supplement may continue until you become eligible for Social Security, generally at age 62, subject to data provided in the annual annuity supplement survey.

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And at age 62, that supplement disappears whether you sign up on Social Security or not. It's gone.

ATTORNEY WILLIAMS: But when that supplement goes away, and you're not quite 62 yet, you can collect Social Security at age 62?

MR. DAWSON: At age 62. Right.

ATTORNEY WILLIAMS: If you choose to?

MR. DAWSON: If you choose to. If you don't, you just lose your supplement and just —.

ATTORNEY WILLIAMS: I understand. Understand. Now, so then if my math is correct, based

upon your pension payment and your FERS supplemental annuity, that you would have received a monthly income of $4,727 when you retired? That would be a gross figure? Does that sound about right?

MR. DAWSON: Give me a calculator and I can tell you in just a moment. Because it has my current gross monthly benefit of $3,926 less or plus your —.

ATTORNEY WILLIAMS: I understand all those deductions, but I'm just talking about the gross number here.

MR. DAWSON: And what figure did you come up with?

ATTORNEY WILLIAMS: $4,727.

MR. DAWSON: You're right.

ATTORNEY WILLIAMS: Okay. And then in a year, that would be approximately $56,700? If my calculator was correct?

MR. DAWSON: $56, —?

ATTORNEY WILLIAMS: I said $56,700.

MR. DAWSON: Twenty-four (24). Right.

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: I think something else I need to clarify here, too, —

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: — that — and I'm not sure if it's reflected in here. There's also a 10 percent reduction on my income for survivors. My wife, right.

ATTORNEY WILLIAMS: Right.

MR. DAWSON: For survivorship for her.

ATTORNEY WILLIAMS: But after that 10 percent deduction was taken, you still got the $3,926 —

MR. DAWSON: That's it.

ATTORNEY WILLIAMS: — a month?

MR. DAWSON: That's it.

ATTORNEY WILLIAMS: Now, when you filed your tax returns and your amended tax returns, you included your 1099-R with that return; correct? Instead of a W-2, you had a 1099 from the Office of Personnel Management?

MR. DAWSON: And put it on which return?

ATTORNEY WILLIAMS: On both of them? When you filed your return —?

MR. DAWSON: I don't think so, because the new instructions now tell you not to submit your 1099, but to fill out the Form IT-140W, West Virginia Withholding Tax Schedule. And they don't have you send it in anymore.

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ATTORNEY WILLIAMS: Okay. Bear with me, one moment, just to make sure I'm looking at all this correctly. Because I know I saw one in here somewhere. If I can just have a moment?

JUDGE POLLACK: Take your time, Mr. Williams.

ATTORNEY WILLIAMS: Thank you. Okay, I think I found it. Now, all I've got to do is find it in here. Can we take a break for just a moment, while I —

JUDGE POLLACK: Sure.

ATTORNEY WILLIAMS: — find it?

JUDGE POLLACK: Sure. We're going to go off the record for five minutes. That way, anyone who needs to use the restroom can. And we'll reconvene in five minutes.

SHORT BREAK TAKEN

JUDGE POLLACK: Okay. We're back on the record in James D. and Elaine F. Dawson, Docket Number 14-026 RPD after a brief restroom break. And when we left, Mr. Williams was cross examining Mr. Dawson.

ATTORNEY WILLIAMS: Thank you. I just have a couple more questions. I was unable to find the document I was looking for, before the break. And I found it, and Mr. Dawson has found it as well. Mr. Dawson, let me ask you on your amended 2010 — that's Taxpayer's Exhibit Seven?

MR. DAWSON: Yes, sir.

ATTORNEY WILLIAMS: The last page on that, I believe, was a 1099-R. Is that correct?

MR. DAWSON: Right. It's attached to the amended, — not to the original ones that I've sent in, but to the amended.

ATTORNEY WILLIAMS: But to the amended one? And I believe your gross distribution for that year was $58,224?

MR. DAWSON: Right.

ATTORNEY WILLIAMS: And that's what you had on your amended return? Yeah, it is.

MR. DAWSON: Okay.

ATTORNEY WILLIAMS: And also, Taxpayer's Exhibit A, the 1099-R, shows a gross distribution of $58,224 for the 2011 calendar year?

MR. DAWSON: I'm sorry. Let me, —

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: — so there is no —. The first one you asked me about, what was on my amended return?

ATTORNEY WILLIAMS: Yes.

MR. DAWSON: It's $50, —.

ATTORNEY WILLIAMS. I stand corrected.

MR. DAWSON: $57,590. That's your taxable amount is $57,590. Your gross distribution is $58,224. Your taxable amount off of this 1099 is $57,590.

ATTORNEY WILLIAMS: And so I ask you the gross distribution and then I asked the wrong question. Because you've reported taxable income —

MR. DAWSON: Right,

ATTORNEY WILLIAMS: — from your federal income tax returns? Yes.

MR. DAWSON: Right. Your tax Statement that you get, your gross distribution at the top has —.

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ATTORNEY WILLIAMS: And that's what I want.

MR. DAWSON: It has to do with — you had already paid taxes on it and it has to do with your retirement. And so, as you — it's paid out over a period of time. How they compute that, I wish I could tell you. I do not know.

ATTORNEY WILLIAMS: I wouldn't want to know.

MR. DAWSON: And they always tell you, your taxable amount. And that's what you have to put on your federal income tax, is your taxable amount.

ATTORNEY WILLIAMS: Okay. Thank you.

MR. DAWSON: Okay. It's in the instructions, —

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: — that you record your taxable amount.

ATTORNEY WILLIAMS: But the 1099s are correct on your gross distribution?

MR. DAWSON: On gross in block one, and taxable in two. Yeah.

ATTORNEY WILLIAMS: Okay.

MR. DAWSON: Yes, sir.

ATTORNEY WILLIAMS: Thank you. No further questions.

JUDGE POLLACK: Okay. I don't think I have any questions for Mr. Dawson.

ATTORNEY POGUE: Okay.

JUDGE POLLACK: Do you have any other witnesses, Mr. Pogue?

ATTORNEY POGUE: I do not. But I do have a couple of exhibits I just want to put in, that were exhibits before in the previous proceeding. Well, some of them were not, actually.

OFF RECORD DISCUSSION

* * *

JUDGE POLLACK: Well, okay. Mr. Pogue, I'll think about that. I'm fairly certain our procedural rules don't have any provision for redaction. And I know there's no statutory provision for redaction. But that doesn't mean that I'm rejecting that request out of hand. Frankly, it's not going to be up to me. I promise you this, leave a note on the file, —

ATTORNEY POGUE: Okay.

JUDGE POLLACK: — that in addition to it being in the record for anybody who reads this transcript. Okay?

ATTORNEY POGUE: I appreciate that. Thank you.

JUDGE POLLACK: No problem. Now, you're resting?

ATTORNEY POGUE: We are resting.

JUDGE POLLACK: Okay. Ms. Schultz.

ATTORNEY SCHULTZ: We would like to call our witness, Teresa Miller.

JUDGE POLLACK: Why don't we give Mr. Dawson's microphone to Ms. Miller. Do you have enough cord there, Ms. Miller.

MS. MILLER: I do.

JUDGE POLLACK: Okay. Go ahead and raise your right hand?

TERESA MILLER, HAVING FIRST BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

ATTORNEY SCHULTZ: Could you State your name for the record; please?

MS. MILLER: Teresa Miller.

ATTORNEY SCHULTZ: And your education?

MS. MILLER: I have a degree in finance from WVU.

ATTORNEY SCHULTZ: And what is your position at the Consolidated Public Retirement?

MS. MILLER: I am the deputy director and chief operating officer.

ATTORNEY SCHULTZ: Could you briefly explain what those positions entail?

MS. MILLER: Sure. Our agency administers nine retirement plans for State and Political subdivisions. And our job — my job entails daily administration, administrative hearings, legislative proposals dealing with the legislature.

ATTORNEY SCHULTZ: So is it fair to say then that you are very familiar with all eight State pension plans?

MS. MILLER: Yes. There are nine.

ATTORNEY SCHULTZ: Oh, nine? I miscounted.

MS. MILLER: Yes, ma'am.

ATTORNEY SCHULTZ: I'm going to be introducing exhibits that we sent to Mr. Pogue. I'm looking for Two and Three.

ATTORNEY WILLIAMS: Two and Three? One, —

ATTORNEY SCHULTZ: Oh, they're right here. They're just wrong.

ATTORNEY WILLIAMS: Two and Three.

ATTORNEY SCHULTZ: Okay. I'm going to show you what they are, so maybe we can get them admitted in one full swoop. If that's all right with you?

ATTORNEY POGUE: Are these the same things you sent me previously?

ATTORNEY SCHULTZ: Yes. Yes, sir.

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ATTORNEY POGUE: Okay. I don't think I need additional copies of them. It they're identical to what you sent —?

ATTORNEY SCHULTZ: They are identical.

ATTORNEY POGUE: Okay.

ATTORNEY WILLIAMS: And you've got One through —?

ATTORNEY POGUE: I have eight here. Is that —?

ATTORNEY WILLIAMS: Eight? I think we're only doing seven.

ATTORNEY POGUE: Okay.

ATTORNEY WILLIAMS: We're not doing Number Eight.

ATTORNEY POGUE: Okay.

ATTORNEY SCHULTZ: So do you want me to lay a foundation or will you stipulate to their admission?

ATTORNEY POGUE: Just because I don't know what some of them are, if you'd just briefly —? I mean, it doesn't have to be the most through thing, but —?

ATTORNEY SCHULTZ: Okay. Let me show you Exhibit One.

OFF RECORD DISCUSSION

JUDGE POLLACK: Okay. So —.

ATTORNEY SCHULTZ: We're going to look at Exhibit One, first.

JUDGE POLLACK: Okay. Which is —? Oh, I see you've already got it. Do you have a cover sheet like that on all of them? They're already marked. Okay. Well, I'm going to be putting State's exhibit stickers on the bottom.

ATTORNEY SCHULTZ: That's fine.

JUDGE POLLACK: All right. So I am marking State's Exhibit One, which is a — it looks like an Excel spreadsheet.

ATTORNEY SCHULTZ: Uh-huh (yes).

JUDGE POLLACK: Okay, now. We're going to wait and admit these after Ms. Schultz lays a brief foundation?

ATTORNEY POGUE: Yes, because I don't what this is or who made it, or — so —.

JUDGE POLLACK: Okay.

ATTORNEY SCHULTZ: Okay. Well, we'll do that. Could you describe and identify what Exhibit One is?

MS. MILLER: Exhibit One is what we refer to as a summary sheet of all of the nine plans that we

administer. We use it routinely in our daily business with the legislature and participating employers. Just it's a brief overview of what the employee contribution rate is, employer contribution rate, what the benefits are, when someone can retire. And on the second page, is a list of the active members, retirees, unfunded liability, percent funding and assets.

ATTORNEY SCHULTZ: Does the Board have a legal obligation to keep this information?

MS. MILLER: We do.

ATTORNEY SCHULTZ: And is it something that you keep in the regular course of running your agency?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: And is this information relied upon by the Governor and the members of the legislature?

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MS. MILLER: Yes,

ATTORNEY SCHULTZ: As well as by all retirees who report to these Boards?

MS. MILLER: Yes.

JUDGE POLLACK: Let me interpret you, one second. Mr. Pogue, I think I've sort of misspoke. By statute, we don't follow the rules of evidence. And at the prehearing conferences, we advise all parties that they're to share all documents prior to the evidentiary hearing, so that there's no, you know, trial by ambush.

ATTORNEY POGUE: Uh-huh (yes).

JUDGE POLLACK: Given that unless the Tax Commissioner's going to introduce a document that

you have not seen, I'm not going to require the Tax Commissioner to set a foundation for every —

ATTORNEY POGUE: Okay.

JUDGE POLLACK: — document prior to admission.

ATTORNEY POGUE: I mean, I can always ask on Cross, —

JUDGE POLLACK: Sure.

ATTORNEY POGUE: — if I want to know what something is. So that's fine.

JUDGE POLLACK: Okay. So given that, we can go through and mark these one at a time, Ms. Schultz. —

ATTORNEY SCHULTZ: Okay.

JUDGE POLLACK: — or in one fell swoop. What would you prefer?

ATTORNEY SCHULTZ: I think we'll start one at a time. And I may regret that and I may change my course —

JUDGE POLLACK: All right. Well, if you —.

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ATTORNEY SCHULTZ: — of action.

JUDGE POLLACK: You have the option to change. But, as of now, State's Exhibit One is admitted.

ATTORNEY POGUE: Sure.

ATTORNEY SCHULTZ: All right.

ATTORNEY POGUE: And I'll say right now, I — because I don't want to object to it. I'd like to know what these things are. But I don't object to any of them. Because, frankly, I don't want to get sent back down here because there was something that they

wanted to put in the record that they didn't get it to, so —

JUDGE POLLACK: Well, I won't take that personally.

ATTORNEY POGUE: No, please don't. Please don't.

JUDGE POLLACK: So go ahead, Ms. Schultz.

ATTORNEY SCHULTZ: All right. And this is public information; isn't it?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: And is this information verified?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: Who verifies this information?

MS. MILLER: We have an in-house actuary. And it is also peer reviewed by an outside actuary.

ATTORNEY SCHULTZ: Okay. And looking at Exhibit One, does it identify the nine State plans?

MS. MILLER: Yes, ma'am.

ATTORNEY SCHULTZ: Could you briefly tell us what the nine State plans are?

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MS. MILLER: Public Employees Retirement Systems, Teachers' Retirement System, Teachers' Defined Contribution Retirement System, State Police Plan A, State Police Plan B, Judge's Retirement System, Deputy Sheriff's Retirement System, EMS Retirement System and Municipal Police and Firefighters Retirement System.

ATTORNEY SCHULTZ: All right. And when this information is verified, you can say then that the information contained on this piece of paper is accurate?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: All of it?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: Okay. What is the plan that has the biggest number of active employees that participate in the pension plan?

MS. MILLER: The Public Employees Retirement System as of 7/1/2010. These plans are valued annually, and so you'll note the date in that left-hand corner.

ATTORNEY SCHULTZ: So they report on fiscal years; is that right?

MS. MILLER: Yes, ma' am.

ATTORNEY SCHULTZ: And then the next highest plan, at least for this year, with active members, was then which plan?

MS. MILLER: The Teachers' Defined Benefit Retirement System.

ATTORNEY SCHULTZ: And when you look down this column, it tells us how many active member we have and how many retired members each of the plans have?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: Now, when you look over at the Deputy Sheriff's Retirement Plan, how many retired members did it have for the year in question?

MS. MILLER: 260.

ATTORNEY SCHULTZ: Now, are all deputy sheriffs members of the deputy sheriffs' plan?

MS. MILLER: No.

ATTORNEY SCHULTZ: What other plan can some of the deputy sheriffs belong to?

MS. MILLER: The Public Employees Retirement System.

ATTORNEY SCHULTZ: And is true that all of the employees who participated in these plans, they make contributions to the plan?

MS. MILLER: Yes. There are employee contributions made in all nine plans administered.

ATTORNEY SCHULTZ: And then there are correspondingly employer contributions, as well?

MS. MILLER: Yes. Some of the plans have different ways of remitting the employer contribution. It's not necessarily a flat percentage of payroll.

ATTORNEY SCHULTZ: So there are some differences in how it's done, —

MS. MILLER: Yes, ma'am.

ATTORNEY SCHULTZ: — which is enumerated on the columns that talk about their respective categories?

MS. MILLER: Yes.

JUDGE POLLACK: Ms. Schultz. If you're going to be facing Ms. Miller, put the mic so you're talking into it. Scoot it over towards Wayne.

ATTORNEY SCHULTZ: I'll just do that.

JUDGE POLLACK: And face it towards you.

ATTORNEY SCHULTZ: Okay. Tell me if I'm doing better, now? It's hard for me to —. It's hard for me here. Is that better? Or no?

JUDGE POLLACK: Go ahead, please —.

ATTORNEY SCHULTZ: Would you like me to try again?

JUDGE POLLACK: No, that's good.

ATTORNEY SCHULTZ: Okay. I'll try to talk louder. Do any retirees in any of the State plans receive a cost of living increase?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: And what plans is that true for?

MS. MILLER: The State Police Plan A and State Police Plan B, and also the — it's not really a cost-of-living annual increase, but sitting judges, if they're in what we would refer to as tier one. Whenever a sitting judge gets a pay raise, then in essence, the retiree gets a pay raise.

ATTORNEY SCHULTZ: Now, do deputy sheriffs who are in the deputy sheriffs' plan receive a cost-of-living increase?

MS. MILLER: No.

ATTORNEY SCHULTZ: Do deputy sheriffs who are in the Public Employees Retirement Fund get a cost-of-living increase.

MS. MILLER: No.

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ATTORNEY SCHULTZ: Okay. Okay. I think that's all the questions I have with regard to Exhibit One. I may move to it, but for now —. Now, we're going to move to Exhibit Two.

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JUDGE POLLACK: Okay. I'm marking State's Exhibit Two, which is another Excel spreadsheet, although this one is brown.

ATTORNEY SCHULTZ: Yes.

JUDGE POLLACK: Mr. Pogue, any objection to the admission of State's Exhibit Two?

ATTORNEY POGUE: No objection.

JUDGE POLLACK: Okay. State's Exhibit Two is admitted.

ATTORNEY SCHULTZ: Does State's Exhibit Two have the same basic information that State's Exhibit One contains?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: Are there any differences that you want to identify?

MS. MILLER: Yes. The actuarial valuation date is as of 7/1/2011. And so this information has been updated with that fiscal year information.

ATTORNEY SCHULTZ: And this chart two is a fiscal year summary?

MS. MILLER: Yes, ma'am.

ATTORNEY SCHULTZ: And again, with regard to this, the plan with the highest number of active members is who?

MS. MILLER: The Public Employees Retirement System.

ATTORNEY SCHULTZ: Followed next by which plan?

MS. MILLER: The Teachers' Defined Benefit Retirement System.

ATTORNEY SCHULTZ: And in this particular year, how many active members were in the deputy sheriff's plan?

MS. MILLER: 954.

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ATTORNEY SCHULTZ: For this year, were deputy sheriffs able to also be in the public employee's retirement plan? Or do they all now fall in the deputy sheriff's plan?

MS. MILLER: How a deputy sheriff could potentially be in the Public Employees Retirement System, is back in 1998, when the Deputy Sheriff Retirement System was enacted, the deputy sheriffs at that time had the option of whether to go to the Deputy Sheriff plan or to remain in Public Employees. And so, those people who elected to remain would still be in PERS, if they're still employed.

ATTORNEY SCHULTZ: And as I understand it, that's the deputy sheriff's election?

MS. MILLER: That's correct. If they were a deputy sheriff in 1998.

ATTORNEY SCHULTZ: If they qualify to be in the PERS plan?

MS. MILLER: Yes. And then, all new hires after that date go into the deputy sheriff retirement plan.

ATTORNEY SCHULTZ: Okay. And which plan had the largest number of retirees for this particular year?

MS. MILLER: The Teachers' Defined Benefit Retirement System.

ATTORNEY SCHULTZ: Followed by which plan?

MS. MILLER: The Public Employees Retirement System.

ATTORNEY SCHULTZ: And how many retirees do we have in the deputy sheriffs' plan for this year?

MS. MILLER: 272.

ATTORNEY SCHULTZ: And again, are some employees in the State's retirement plan eligible to get a cost-of-living increase?

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MS. MILLER: The State Police Plan A, State Police Plan B receive an annual increase. And then the judges, if they were on the bench prior to 7/1/2005.

ATTORNEY SCHULTZ: And the deputy sheriffs do not receive a cost-of-living increase, do they?

MS. MILLER: Correct.

ATTORNEY SCHULTZ: And with regard to the State Police in both plans for this year and the previous year, isn't true that those State Policemen are not eligible to receive Social Security?

MS. MILLER: That is correct. They opted out of Social Security.

ATTORNEY SCHULTZ: And that's reflected on both of these charts?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: Okay. Now we're going to move to Exhibit Three.

JUDGE POLLACK: Okay. Petitioner's Exhibit Three — I mean, State's Exhibit Three, pardon me, is again an Excel spreadsheet, red, and then dated 7/1/2012. I'm marking that as State's Exhibit Three. Mr. Pogue, any objection to its admission?

ATTORNEY POGUE: No objection.

JUDGE POLLACK: Okay. State's Exhibit Three is admitted.

ATTORNEY SCHULTZ: And is it correct here, as well, that it has the same basic information as the previous two summaries?

MS. MILLER: Yes, ma'am.

ATTORNEY SCHULTZ: Obviously, the numbers have changed depending upon the factual change from fiscal year to fiscal year?

MS. MILLER: Correct.

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ATTORNEY SCHULTZ: And with regard to this summary page, who is the largest employer with active members — plan?

MS. MILLER: The Public Employees' Retirement System.

ATTORNEY SCHULTZ: Followed by who?

MS. MILLER: The Teachers' Defined Benefit Retirement System.

ATTORNEY SCHULTZ: And how many active employees do we have for the Deputy Sheriffs'?

MS. MILLER: 979.

ATTORNEY SCHULTZ: And again, depending upon the date of hire, some deputy sheriffs might still belong in the Public Employees Retirement System?

MS. MILLER: Yes, ma'am.

ATTORNEY SCHULTZ: And what is the plan with the largest number of retirees for this year?

MS. MILLER: The Teachers' Defined Benefit Retirement System.

ATTORNEY SCHULTZ: Followed by —?

MS. MILLER: The Public Employees Retirement System.

ATTORNEY SCHULTZ: And how many retirees does the deputy sheriff's pension plan have for this particular year?

MS. MILLER: 283.

ATTORNEY SCHULTZ: And again, on this chart we see that it appears that the State Police continue to be eligible for a cost-of-living increase?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: And the deputy sheriffs are not?

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MS. MILLER: Correct.

ATTORNEY SCHULTZ: And public employees are not?

MS. MILLER: Correct,

ATTORNEY SCHULTZ: And teachers are not?

MS. MILLER: Correct.

ATTORNEY SCHULTZ: Now, we're going to move to Exhibit Four.

JUDGE POLLACK: Okay. Which is an annual report for the Consolidated for the Consolidated Public Retirement Board for the fiscal years ending June 30th, 2010 and June 30th, 2011. Which I'm marking as State's Exhibit Four. Mr. Pogue, any objection —

ATTORNEY POGUE: No objection.

JUDGE POLLACK: — to admission? Okay. State's Exhibit Four is admitted.

ATTORNEY SCHULTZ: And can you generally describe what is contained in this document?

MS. MILLER: Yes, this is our annual report for all of the nine retirement plans that we administer.

ATTORNEY SCHULTZ: I'd like you to turn to the actuarial figures and statistics section, which I think starts on page 28.

JUDGE POLLACK: Okay.

ATTORNEY SCHULTZ: No. Actually, it starts a little before that. It's an unnumbered page 26. A big black piece of paper that says actuary figures and statistics.

JUDGE POLLACK: All right. We should probably —.

ATTORNEY SCHULTZ: It's right after page 25. But it happens to not be numbered.

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JUDGE POLLACK: Right. There's a black heading page, as Ms. Schultz identified. And it's the next page after that?

ATTORNEY SCHULTZ: Well, we're actually going to 28, which is two pages after that, if my math's working for me today.

JUDGE POLLACK: Okay.

ATTORNEY SCHULTZ: Are you on that page?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: Can you —?

JUDGE POLLACK: Mr. Pogue, are you with us?

ATTORNEY SCHULTZ: Yes.

JUDGE POLLACK: Okay.

ATTORNEY SCHULTZ: You're with me. Okay.

RIDGE POLLACK: Go ahead, Ms. Schultz.

ATTORNEY SCHULTZ: Good job. I'm going to look at what is the second column, which is titled Defined Benefit Retirement Plan Figures as of June 30, 2010. Do you see that second —?

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MS. MILLER: Yes.

ATTORNEY SCHULTZ: Okay. And then looking at that, can you tell me what the average monthly benefit —.

JUDGE POLLACK: Wait, Ms. Schultz. You better face that way.

ATTORNEY SCHULTZ: Oh, okay. Sorry.

JUDGE POLLACK: Go ahead. Just ask that question, again.

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ATTORNEY SCHULTZ: I'm sorry. I apologize. Could you tell me, in looking at the column Average Monthly Benefit, as you're going horizontally down, going across, what was the — what is reflected as the average monthly retirement benefit for deputy sheriffs?

MS. MILLER: $2,349.

ATTORNEY SCHULTZ: And if you go down, I think two more columns, what is that column titled?

MS. MILLER: Average Monthly Salary Receiving at Retirement.

ATTORNEY SCHULTZ: And what is the average monthly salary of deputy sheriffs at the time of their retirement?

MS. MILLER: $3,659.

ATTORNEY SCHULTZ: Okay. Okay. And then the very next page, if you go to the second column, I'm looking at Defined Benefit Retirement Plan Figures as a June 30th, 2010. Is everybody with me?

ATTORNEY POGUE: You turn to the next page?

ATTORNEY SCHULTZ: It's the next page.

ATTORNEY POGUE: Is it 2011?

ATTORNEY SCHULTZ: 2011. I misspoke. It's 2011.

ATTORNEY POGUE: Okay.

ATTORNEY SCHULTZ: I apologize.

ATTORNEY POGUE: That's all right. Just trying to make it clear for the record.

ATTORNEY SCHULTZ: Make sure we're right.

ATTORNEY POGUE: Yes.

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ATTORNEY SCHULTZ: Yes, in 2011. Okay. And can you tell me the average monthly salary at the time of retirement for deputy sheriffs?

MS. MILLER: $3,722.

ATTORNEY SCHULTZ: Okay. And what's the average monthly benefit for the deputy sheriffs?

MS. MILLER: If I might clarify, because there's actually two columns —

ATTORNEY SCHULTZ: Uh-huh (yes).

MS. MILLER: — for average monthly benefit?

ATTORNEY SCHULTZ: Uh-huh (yes).

MS. MILLER: There is a section, the top portion of that chart, is for new retirees.

ATTORNEY SCHULTZ: Okay.

MS. MILLER: That average monthly benefit is $2,195.

ATTORNEY SCHULTZ: Okay.

MS. MILLER: But down when you go to the bottom half of that chart for all retirees, —

ATTORNEY SCHULTZ: And this is deputy sheriffs we're talking about?

MS. MILLER: Deputy sheriffs. The average monthly for all retirees is $1,826. And if I can clarify in my testimony, previous on page 28 —?

ATTORNEY SCHULTZ: Okay.

MS. MILLER: I believe I was — I believe I cited the new retiree numbers, not the all-retiree numbers.

ATTORNEY SCHULTZ: Okay. So tell us first — we're going to go back to the 2010 chart, just so we can clear up the record, which is the page before. And tell me what the average monthly salary was for all retirees?

MS. MILLER: That number is not tracked by our actuary.

ATTORNEY SCHULTZ: Okay.

MS. MILLER: It is only in the top portion of this box, because they only track it for the new retirees.

ATTORNEY SCHULTZ: Okay.

MS. MILLER: So the 12 new retirees that occurred in fiscal year 2010, their ave ge monthly salary at retirement was $3,659.

ATTORNEY SCHULTZ: Okay.

MS. MILLER: That number is not averaged for all retirees.

ATTORNEY SCHULTZ: I understand. And what can you tell us about the average salary numbers that are on this page, for the deputy sheriffs?

MS. MILLER: Do you mean the average monthly benefit or the average salary at retirement?

ATTORNEY SCHULTZ: I'm going to ask both. So answer the average monthly benefit first, for all retirees, if we have that number?

MS. MILLER: The average monthly benefit for all retirees under the deputy sheriff retirement plan is $2,349.

ATTORNEY SCHULTZ: And so to clarify, that includes all retirees; is that right?

MS MILLER: Yes.

ATTORNEY SCHULTZ: And then the average monthly salary, what does this chart tell us, for deputy sheriffs?

MS. MILLER: $3,659.

ATTORNEY SCHULTZ: And is there a qualification with regard to what that information spans?

MS. MILLER: That would span just those retired in that fiscal year.

ATTORNEY SCHULTZ: Have we clarified what you wanted to, with —

MS. MILLER: Yes, ma'am.

ATTORNEY SCHULTZ: — regard to that page? Okay. Let's look at the next page? And we're looking at Defined Benefit Retirement Plan figures as of June 30, 2011. And what was the average monthly salary received at the time of the retirement?

MS. MILLER: $3,722.

ATTORNEY SCHULTZ: And does that just reflect the most recent retirees, when we're looking at the average salary?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: Okay. With regard to average monthly benefit, what is that number for deputy sheriffs?

MS. MILLER: The average monthly benefit for all deputy sheriffs is $1,826.

ATTORNEY SCHULTZ: Okay.

MS. MILLER: The average monthly benefit for the new retirees that retired in that fiscal year is $2,195.

ATTORNEY SCHULTZ: Okay. Now I'm going to move to my next exhibit.

JUDGE POLLACK: Okay. Which is another annual financial report from the Public Retirement Board for fiscal year ending June 30th, 2012; correct?

ATTORNEY SCHULTZ: That's correct.

JUDGE POLLACK: And I'm marking that as State's Exhibit Five. And Mr. Pogue?

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ATTORNEY POGUE: No objection.

JUDGE POLLACK: All right. State's Exhibit Five is admitted.

ATTORNEY SCHULTZ: And can you generally describe what is contained in this document?

MS. MILLER: Yes. This is a comprehensive annual financial report, or what many refer to as a CAFR. It's structured a little bit differently than the previous report, which was just a regular annual report. But this is something that we provide and get the GFOA CAFR certification on.

ATTORNEY SCHULTZ: Could you tell us what GFOA certification is?

MS. MILLER: I believe it's Government Financial Accounting — or, Oversight on Accounting Board. It's the accounting gurus.

ATTORNEY SCHULTZ: Okay. I presume it's something that we have to have for our plan?

MS. MILLER: We do not have to have a CAFR. This was actually the first year in which we obtained a CAFR. It's a certification verifying your financial records

ATTORNEY SCHULTZ: Okay. So we decided to take an extra step than is required?

MS. MILLER: Yes. Correct.

ATTORNEY SCHULTZ: For this year?

MS. MILLER: Correct.

ATTORNEY SCHULTZ: Okay. I'm turning now to page 205. Could you describe what this page reflects?

MS. MILLER: It reflects the Deputy Sheriff Retirement System, and the average monthly benefit and the number of active retireants.

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ATTORNEY POGUE: I'm sorry, what page are we on, again?

ATTORNEY SCHULTZ: I'm so sorry, 205.

ATTORNEY POGUE: 205? I'm sorry. I was on 25. I was wondering —.

ATTORNEY SCHULTZ: It would make my questions even harder to follow.

ATTORNEY POGUE: Okay.

ATTORNEY SCHULTZ: So tell us again what this page generally reflects.

MS. MILLER: For years 2005 through 2011, it reflects the average monthly benefit, broken down based upon years of credited service and the number of active retireants.

ATTORNEY SCHULTZ: And as I understand, a deputy sheriff's pension amount is derived by a combination of his salary and his years of service; is that correct?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: Those are the factors that go into calculating the deputy sheriff's salary?

MS. MILLER: Yes, if you're under the deputy sheriff retirement plan.

ATTORNEY SCHULTZ: And if you're under the public employees retirement plan, does it as well reflect an average of the certain number of years of your service, plus years of service?

MS. MILLER: It's the same components, but at different rates.

ATTORNEY SCHULTZ: That's right.

MS. MILLER: The final average salary in PERS is your three high years out of last 15.

ATTORNEY SCHULTZ: Right.

MS. MILLER: Under the deputy sheriff retirement plan, it's your five highest out of the last 10.

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ATTORNEY SCHULTZ: Now, —

MS. MILLER: And the multiplier is also different.

ATTORNEY SCHULTZ: Now, as I understand it, deputy sheriffs have an earlier age at which they can retire, than public employees; is that right?

MS. MILLER: Yes.

ATTORNEY SCHULTZ: And what is their earliest time to be able to retire for a deputy sheriff?

MS. MILLER: Age 50, with 20 years of service.

ATTORNEY SCHULTZ: Now, do our deputy sheriffs have a mandatory retirement age in West Virginia?

MS. MILLER: I believe they do. I believe it's 65.

ATTORNEY SCHULTZ: And are you familiar with the salary ranges for the deputy sheriffs, since that's a

component piece of the contributions that come into your plans?

MS. MILLER: On a broad scale.

ATTORNEY SCHULTZ: On a broad scale, can you tell us what you believe the average salary for a deputy sheriff is in the State of West Virginia?

MS. MILLER: I could guess. But I'm sure that our actuary would have that information as to what the average salary is. If I had to take a guess at the average, I would guess somewhere $50,000 range.

ATTORNEY SCHULTZ: Do you know of any of our deputy sheriffs that make $100,000 a year?

MS. MILLER: I actually did check prior to this hearing to see if there was anyone in the deputy sheriff retirement system over $100,000, and there is not.

ATTORNEY SCHULTZ: Can I confer with Mr. Williams for five minutes, just to make sure I travelled through all my numbers?

JUDGE POLLACK: Sure. Sure. We're going to go off the record, so Counsel can confer.

ATTORNEY SCHULTZ: Thank you.

SHORT BREAK TAKEN

JUDGE POLLACK: Okay. We're back on the record in of James D. and Elaine F. Dawson, Docket Number 14-026 RPD, after a brief restroom break. And when we left, Ms. Schultz was directly examining Ms. Miller; correct?

ATTORNEY SCHULTZ: Yes. And I am done and — with my Direct Examination. And we'll see if Mr.

Pogue has anything to whet my interests after his finished with his Cross.

JUDGE POLLACK: All right. Wait —

ATTORNEY POGUE: Okay.

JUDGE POLLACK: I'm sorry to interrupt. Before you start, though, we have marked five State's exhibits. I have two exhibits that I was handed that I'm going to give back to you.

ATTORNEY SCHULTZ: You'll be needing them.

JUDGE POLLACK: Oh, okay.

ATTORNEY SCHULTZ: I just want to finish with this witness, and then address those.

JUDGE POLLACK: Okay, fine. I'll hold onto them for the time being. Mr. Pogue. It's your witness.

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ATTORNEY POGUE: Okay. Thank you. I'm going to hand her a copy of the statute. We don't need to introduce this as an exhibit. But if anyone wants it, —.

JUDGE POLLACK: It's 11-21-12, I presume?

ATTORNEY POGUE: Yes.

JUDGE POLLACK: Okay.

ATTORNEY POGUE: Now, Ms. Miller, I would like for you to turn to the second page of this, and look down at paragraph six. And what I'd like to do with you, is walk through each one of the retirement systems that are mentioned in this paragraph six, and ask you a couple of questions about them. Okay?

MS. MILLER: Yes.

ATTORNEY POGUE: So the first one that it mentions specifically, it says any West Virginia police, but then it says West Virginia Firemen's Retirement System. Is there such a thing as the West Virginia Firemen's Retirement System; to your knowledge?

MS. MILLER: If I can talk here, just for a minute. The municipal police and fire plan that we administer was created in 2010. So there's kind of what I'll call old plan, and then our new plan. The Consolidated Public Retirement Board does not administer the old plans. Those are administered by each of the cities that have those, such as the City of Charleston, the City of Huntington, the City of Wheeling. We do not administer those. So I would interpret, you know, that that would mean — because it says under any of the Police or Firemen's Retirement Systems, I would interpret that to definitely mean the old plans.

ATTORNEY POGUE: Okay.

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MS. MILLER: And possibly the new plan that we administer, in which we have no retirees.

ATTORNEY POGUE: Okay. So you don't have any knowledge of any plan that you administer that is entitled West Virginia Firemen's Retirement System?

MS. MILLER: Potentially, the new retirement that was created in 2010.

ATTORNEY POGUE: What retirement plan is that?

MS. MILLER: On the summary sheets, it's the last column, the Municipal Police and Firefighters Retirement System.

ATTORNEY POGUE: Well, let me just ask you about that then? I noticed in the — on the first one of these, the 2010 chart for covered by Social Security, under that column from Municipal Police and Firefighters Retirement System, it says unknown?

MS. MILLER: Yes, sir.

ATTORNEY POGUE: So —?

JUDGE POLLACK: And, I'm sorry, let's just clarify. You're referring to State's Exhibit One?

ATTORNEY POGUE: State's Exhibit One, yes. So it's the case that whoever prepared this document, did not know whether enrollees in that retirement system paid Social Security or not?

MS. MILLER: No. The participants in the municipal police and retirement system have until October 1st of 2015 to present a plan to the State auditor, as to whether — for them to have an election on whether or not to vote up or down participation in Social Security.

ATTORNEY POGUE: Okay. So the individual enrollees can choose whether they participate in Social Security or not?

MS. MILLER: No, sir.

ATTORNEY POGUE: Oh, I'm sorry.

MS. MILLER: So the employers that participate in this plan —

ATTORNEY POGUE: Okay.

MS. MILLER: — have to provide a plan to the State auditor by October 1, 2015 to talk about how they're going to have this election.

ATTORNEY POGUE: I understand.

MS. MILLER: And the participants in that plan are going to elect as a whole either to participate in Social Security or not to.

ATTORNEY POGUE: Okay.

MS. MILLER: Similar to what the State Police did many years ago, when they opted out of Social Security.

ATTORNEY POGUE: So it may be the case that the Wheeling Police Department participates in Social Security and the Charleston Police Department does not?

MS. MILLER: Do you mean in the old plan that we do not administer?

ATTORNEY POGUE: I mean in the new system, that you do administer?

MS. MILLER: It's my understanding that currently they're not participating in Social Security.

ATTORNEY POGUE: Okay.

MS. MILLER: But they soon may have the option to participate in Social Security.

ATTORNEY POGUE: Okay. So currently, under this Municipal Police and Firefighters Retirement System, nobody is participating in Social Security?

MS. MILLER: I don't know that for a fact.

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ATTORNEY POGUE: Okay. Okay. Now, the next retirement system that is specifically mentioned in this statute is the West Virginia State Police Death, Disability and Retirement Fund. Is that something

that you administer? Is that either State Plan A or State Plan B?

MS. MILLER: Yes, that is State Police Plan A.

ATTORNEY POGUE: Okay. And the enrollees in that system do not participate in Social Security; correct?

MS. MILLER: Correct.

ATTORNEY POGUE: And the same for State Plan B?

MS. MILLER: Correct.

ATTORNEY POGUE: And is State Plan B the West Virginia State Police Retirement System?

MS. MILLER: Yes.

ATTORNEY POGUE: Okay. And the last thing here is — the last retirement system, specifically mentioned in this statute in paragraph six, is West Virginia Deputy Sheriff Retirement System. Now, deputy sheriffs do participate in Social Security; correct?

MS. MILLER: Yes.

ATTORNEY POGUE: Okay. And so Social Security taxes are deducted from their paychecks; correct?

MS. MILLER: Yes.

ATTORNEY POGUE: And when they reach the age of eligibility, they can collect Social Security benefits; correct?

MS. MILLER: Yes.

ATTORNEY POGUE: Okay. So if I understand you correctly, the only people in this paragraph six, that

you can say for certain do not collect — do not participate in Social Security are the West Virginia State Police retirement systems?

MS. MILLER: Correct.

ATTORNEY POGUE: Okay. And you testified earlier when the Tax Department was questioning you about some of the formulas or factors in the formulas for eligibility and computation of benefits under these various retirement systems that are in the exhibits that you discussed; correct?

MS. MILLER: Yes.

ATTORNEY POGUE: Okay. Would it be fair to say that the formulas and the factors for determining the amount of benefits and the time of eligibility are set forth in either a statute or a regulation?

MS. MILLER: Yes.

ATTORNEY POGUE: Do you know which? Is it a statute or is it a regulation?

MS. MILLER: Statute.

ATTORNEY POGUE: Okay. And would it be fair to say that nothing in your testimony today would be any different than what would be in the statute, if I were to look it up?

MS. MILLER: Correct.

ATTORNEY POGUE: Okay. So if you testified to the way that a certain benefit is calculated today, your testimony is based off the formula and the statute?

MS. MILLER: Yes.

ATTORNEY POGUE: Okay. I don't think I have anything else.

ATTORNEY SCHULTZ: I have nothing further.

* * *

JUDGE POLLACK: Right.

ATTORNEY POGUE: Okay.

JUDGE POLLACK: I'm doing the certificate and the bill. A copy of the bill.

ATTORNEY POGUE: Okay.

JUDGE POLLACK: Then, I'm turning to a letter from the Governor to Secretary of State Tennant, dated May 3rd, 2013. I presume the Tax Commissioner wants that to be State's Exhibit Seven?

ATTORNEY SCHULTZ: Yes, that's the veto message from the Governor.

JUDGE POLLACK: Okay. So I'm marking that as State's Exhibit Seven. Any objection to its admission?

ATTORNEY SCHULTZ: No objection.

JUDGE POLLACK: Okay. So in case I didn't say it properly, State's Exhibit Six and Seven are admitted.

ATTORNEY SCHULTZ: That's fine. That's all we have.

JUDGE POLLACK: Okay. Well, then, here's what I think we need to do. First of all, let's just proceed to closing — any closing arguments the parties want to make.

ATTORNEY POGUE: Yes.

JUDGE POLLACK: And then we'll do the housekeeping stuff. Go ahead, Mr. Pogue.

ATTORNEY POGUE: Sounds good to me. Well, Petitioner Jim Dawson is a former United States Marshal, who retired in — or on March 31st, 2008

after 25 years of service. He tried to claim the exemption in West Virginia Code 11-21-(c)6 (sic). He was denied. Now, on its face, that statutory section only applies to State and local law enforcement officers — and firefighters, excuse me. But, in 2000, the Monongalia County Circuit

Court decided the case of *Dodson v. Palmer* and determined that the statute was unconstitutional to the extent that it did not offer the same tax treatment to similarly situated federal law enforcement officers. Ever since Dodson, I believe it's been this office's position, that federal law enforcement officers are entitled to the exemption in 11-21-12(c)6, as long as they do not collect Social Security. I think the Tax Department has through the Tax Commissioner — has acquiesced to this for close to 14 years, if not longer, to this point.

Now, in this case, Petitioner Jim Dawson is a FERS retiree and not a CSRS retiree, meaning that he is eligible to receive Social Security when he reaches the appropriate age. And that's why we're here today. If he were a CSRS guy, I assume he would have just been granted the exemption and this whole thing would be over by now.

Now, Dodson was based on the premise that all of the law enforcement officers and firefighters mentioned in 11-21-12(c)6 could not recover Social Security benefits. I think we've establish pretty conclusively that that is incorrect. I think the Tax Department has essentially acknowledged this, but to the extent that their acknowledgments are not enough, Mr. Dawson has testified that he is a former

West Virginia deputy sheriff and that he paid into and participated in Social Security during that time. And we introduced various documents, including his paystubs and W-2s supporting that.

Furthermore, West Virginia Code §7-14-4(a), which established the West Virginia Deputy Sheriffs' Retirement System, specifically states that nothing in this article may be construed to permit a county to substitute this plan for federal Social Security. And lastly, Ms. Miller here today, from the West Virginia Consolidated Public

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Employees Retirement Board, testified that deputy sheriffs participate in Social Security. So I think, hopefully, that issue is concluded. So it's the fact that Petitioner Jim Dawson is not — or is capable of collecting of Social Security, is not a basis for denying him the exemption in 11-21-12(c)6.

But in order to understand why he should be given the exemption, even though he is not a state or local law enforcement officer, I'll have to talk about the constitutional doctrine of intergovernmental tax immunity. Now, the United States Supreme Court held in *Davis v. Michigan* and reiterated in subsequent cases that a State tax violates the federal constitutional doctrine of intergovernmental tax immunity if it treats State employees more favorably than similarly situated federal employees, unless the inconsistent tax treatment is directly related to and justified by significant differences between the two classes.

Now, in *Dodson*, I believe Judge Stone — or, he opined that there were no significant differences

between State and federal law enforcement officers, other than this Social Security distinction that he came up with, without citing to anything. And I believe that the Office of Tax Appeals has more or less adopted that position for the past 14 or so years. I don't believe that in that time, the Tax Department has ever seriously contended that there are significant differences that justify differential tax treatment. I know they never appealed the Dodson decision. They never appealed any of the various Office of Tax Appeal decisions that gave this exemption to CSRS federal law enforcement officers. So I don't believe that they credibly argue at this point that there are significant differences beyond this phantom Social Security issue, that justified a

significant — or a different tax treatment for federal law enforcement officers and State law enforcement officers.

And I think it's pretty clear that there are significant differences. As Petitioner testified, his duties as both, you know, as a U.S. Marshal and deputy U.S. Marshal, and as a West Virginia deputy sheriff involved investigating crimes, apprehending criminals or suspected criminals, you know, the same type of general law enforcement duties. And 28 USC §564 provides that United States Marshals, deputy marshals, and such other officials of the service as maybe designated by the director in executing the laws of the United States within its State, may exercise the same powers, which a sheriff of the State may exercise in executing the laws thereof.

Similarly, West Virginia Code §15-10-5 gives federal law enforcement officers, including United States Marshals and deputy marshals the authority to enforce the laws of the State of West Virginia, where a felony is committed in their presence or where they're asked to provide assistance via State or local law enforcement agency or officer. Finally, at page 16 of the Tax Department's brief to Judge Swope in previous proceeding, I believe they stated that the Tax Department admits that the U.S. Marshals and deputy sheriffs have similar job descriptions. So I don't think there's any real issue there.

Let's see — I don't think this office has ever found significant differences between the State and federal law enforcement officers that justify inconsistent tax treatment. And I think because the preferential tax treatment afforded to State and local law enforcement officers by 11-21-12(c)(6) is not directly related to and justified by significant differences between .State, local and federal law enforcement officers, the statute is unconstitutional on its face.

* * *

WEST VIRGINIA OFFICE OF TAX APPEALS

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CHIEF ADMIN. LAW JUDGE

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

DAWSON, JAMES D., and ELAINE F., Petitioners, v. **MATKOVICH, MARK W., as STATE TAX COMMISSIONER** of **WEST VIRGINIA** Respondent	))))))))	**DOCKET NO. 14-026 RPD**
PRESIDING ADMINISTRATIVE LAW JUDGE:		A.M. "Fenway" Pollack
PETITIONERS' COUNSEL:		David R. Pogue, Esq.
RESPONDENT'S COUNSEL:		Katherine A. Schultz, Esq. Senior Deputy Attorney General

L. Wayne Williams, Esq.
Assistant Attorney General

Timothy S. Waggoner, Esq.
West Virginia State Tax
Department

EVIDENTIARY HEARING HELD: January 23, 2015

SUBMITTED FOR DECISION: February 20, 2015

SYNOPSIS

OFFICE OF TAX APPEALS CONCLUSION OF LAW

In hearings conducted by the West Virginia Office of Tax Appeals, the taxpayer has the burden of proof.

WEST VIRGINIA SUPREME COURT OF APPEALS CASE LAW

It is well settled that all tax exemptions are strictly construed against the taxpayer claiming the exemption. *Wooddell v. Dailey*, 160 W. Va. 65, 230 S.E.2d 466 (1976); *RGIS Inventory Specialists v. Palmer*, 209 W.Va. 152, 544 S.E.2d 79 (2001).

UNITED STATES SUPREME COURT OF APPEALS CASE LAW

Under the principles of intergovernmental immunity, the United States Supreme Court struck down as discriminatory, under 4 U.S.C. § 111, a tax scheme that taxed all federal pensions, which at the same time exempted all state pensions. *Davis v.*

Michigan Department of Treasury, 489 U.S. 803 (1989).

WEST VIRGINIA SUPREME COURT OF APPEALS CASE LAW

In *Dodson v. Palmer*, C.A. No. 00-C-AP-10 (Monongalia County Circuit Court W. Va. 2000), the Court applied *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), finding that West Virginia Code Section 11-21-12(c)(6) was unconstitutional as applied to that appellant.

WEST VIRGINIA SUPREME COURT OF APPEALS CASE LAW

The West Virginia Supreme Court of Appeals did not find *Davis* controlling according to the circumstances presented in *Brown v. Mierke*, 191 W. Va. 120, 443 S.E.2d 462 (1994). The test to determine whether the tax scheme is discriminatory against an officer or employee is not merely because the source of the compensation is different, but rather, because of the totality of the circumstances which are present. Those circumstances determine whether the intent of the scheme is to discriminate against employees and former employees of the federal government.

WEST VIRGINIA SUPREME COURT OF APPEALS CASE LAW

In *Brown*, "totality of the circumstances" meant that there was no intent to discriminate where military retirees, who constituted less than four percent of all State government retirees, were treated more favorably than those retired from civilian occupations, as well as retired state employees and teachers, and where such retirees were treated substantially more favorably than those persons

retired from the West Virginia Judicial Retirement System.

WEST VIRGINIA SUPREME COURT OF APPEALS CASE LAW

Retired U.S. Marshals, like the military retirees in *Brown*, were treated more favorably than retirees from the West Virginia civilian workforce, as equally as persons retired from the West Virginia Public Employees Retirement System and the West Virginia Teachers Retirement System, and more favorably than retirees from the West Virginia Judicial Retirement System. Therefore, the intent of the West Virginian scheme was not to discriminate against federal retirees but rather to give a very narrow benefit to former state and local employees.

OFFICE OF TAX APPEALS CONCLUSION OF LAW

Mr. Dawson's source of pay or compensation alone, absent a showing of other circumstances required by *Brown v. Mierke*, do not provide sufficient evidence that the exemption at issue is discriminatory as applied to the Petitioner.

WEST VIRGINIA SUPREME COURT OF APPEALS CASE LAW

Based upon the specialized circumstances as set forth in *Brown*, we do not find that our decision conflicts with the holding in *Davis*, where a blanket exemption of all state and local employee pensions, while at the same time taxing federal retiree pensions, evidenced Michigan's intent to discriminate.

OFFICE OF TAX APPEALS
CONCLUSION OF LAW

West Virginia Code Section 11-21-12(c)(6), as applied to the Petitioners, complies with Syl. Pt. 2 of the West Virginia Supreme Court decision in *Brown v Mierke*.

OFFICE OF TAX APPEALS
CONCLUSION OF LAW

Petitioners have not met their burden of proof, as set forth in W. Va. Code § 11-10A-10(e), which requires a showing that they are entitled to the strictly construed tax exemption contained in West Virginia Code Section 11-21-12(c)(6).

FINAL DECISION

On November 15, 2013, the Tax Account Administration Division of the West Virginia State Tax Commissioner's Office, (hereafter, the "Respondent"), denied James and Elaine Dawson's (hereafter, the "Petitioners") Schedule M modifications on their 2010 and 2011 amended personal income tax returns. Thereafter, on January 10, 2014, the Petitioners timely filed their "petition for refund" with this Tribunal, The West Virginia Office of Tax Appeals (sometimes referred to herein as "OTA"). *See* W. Va. Code §§ 11-10A-8(2) and 11-10A-9(a)-(b).

PROCEDURAL HISTORY

In their petition for refund, the Petitioners argued that Mr. Dawson's pension as a United States Marshal should be exempt under West Virginia Code Section 11-21-12(c)(6) because that same code section exempts pensions paid to retired West Virginia law

enforcement officials, retired West Virginia firefighters, retired West Virginia state police and retired West Virginia deputy sheriffs.

Prior to the hearing, Petitioners filed a "Motion for Summary Judgment" with this Tribunal, asking us to declare that income to be tax exempt. Because we concluded that this Tribunal, as a part of the executive branch of government, lacked subject-matter jurisdiction to declare a statute unconstitutional, we denied Petitioners' "Motion for Summary Judgment" and dismissed the matter from our docket. The Petitioners, by counsel, timely appealed this Tribunal's "Order of Dismissal" to the Circuit Court of Mercer County, West Virginia.

On October 28, 2014, the Honorable Derek C. Swope, Judge of the Circuit Court of Mercer County, West Virginia, ordered that this matter be remanded to this Tribunal. Because of the detailed nature of Judge Swope's findings and directives, we have recited the pertinent portions of that Order, to wit:

> 16. The Dawsons have argued before this Court that the refund issue will be determined by the United States Supreme Court decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) and similar cases based on the intergovernmental tax immunity doctrine codified as 4 U.S.C. § 111. The Tax Department has argued that the refund issue will be determined by the West Virginia Supreme Court decision in *Brown v. Mierke*, 191 W. Va. 120,443 S.E.2d 462 (1994) *cert, denied* 513 U.S. 877 (1994) *sub nom Brown v. Paige*, which reviewed W. Va.

Code § 1 l-21-12(c)(6) in a *Davis v. Michigan* challenge.

17. At this time, the Court concludes that the applicable law governing this case is the West Virginia Supreme Court decision in *Brown v. Mierke* and, in particular, Syl. Pt. 2 which states:

> Challenges to a state tax scheme under 4 U.S.C. § 111 can succeed only when one purpose of the challenged scheme is shown to discriminate against the officer or employee because of the source of pay or compensation. In determining whether such discrimination exists, a court will look to the totality of the circumstances to ascertain whether the intent of the scheme is to discriminate against employees or former employees of the federal government.

(Emphasis in original.) The record from the Office of Tax Appeals contains no factual development whatsoever regarding the totality of the circumstances concerning whether the intent behind W. Va. Code § 11-21 -12(c)(6) discriminates against federal retirees based upon the source of the pay.

18. It is well settled that when a circuit court conducts judicial review of a decision issued by an administrative agency, the reviewing court is limited to the evidentiary record developed before the administrative agency. *See Frymier-Halloran v. Paige*, 193 W. Va. 687, 458 S.E.2d 780 (1995) at Syl. Pt. 3 ("...the focal point for judicial review should be the administrative record, not some new record made initially in the reviewing

court") *see also Delmer Workman v. Workmen's Compensation Commission, et al.*, 160 W.Va. 656, 662, 236 S.E.2d 236, 240 (1977) (Without such record findings of an administrative agency, the Court, on judicial review, is greatly at sea without a chart or compass in making its determination and adjudication as to whether the agency decision is plainly right or clearly wrong.)

WHEREFORE, the Court:

1. Remands this matter to the West Virginia Office of Tax Appeals for further proceedings pursuant to W. Va. Code § 29A-5-4(g).

2. The Office of Tax Appeals is directed to conduct an evidentiary hearing on the *Petition for Refund* as required pursuant to W. Va. Code §§11-10A-10(a) and 29A-5-1.

3. The Office of Tax Appeals shall make detailed findings of fact and set forth conclusions of law regarding whether W.Va. Code § 11-21-12(c)(d) complies with Syl. Pt. 2 of the West Virginia Supreme Court decision in *Brown v. Mierke*.

4. The Office of Tax Appeals shall decide all issues related to the *Petition for Refund* except for the constitutionality of W. Va. Code § 11-21-12(c)(6).

5. If either party believes that a decision on the *Petition for Refund* should **not** be governed by *Brown v. Mierke*, then that party shall put forth the argument and support its alternative legal theory at the OTA hearing.

6. Once the final decision is issued, then both parties shall be able to seek judicial review, if

they choose to do so, as set forth in W. Va. Code §§ 11-10A-18 and 11-10A-19.

On January 23, 2015, an evidentiary hearing was held, at the conclusion of which the Tax Commissioner, by counsel, requested the opportunity to file post-hearing briefs. Petitioners' counsel consented to that request. Both parties then agreed to submit simultaneous briefs within fourteen (14) days with responses due within ten (10) business days thereafter.

While this Tribunal does not have jurisdiction to deem the statute in question unconstitutional, we are called upon here to answer the question of whether the statute is discriminatory as applied to Petitioners. We hold that it is not for the reasons set forth herein.

FINDINGS OF FACT

1. Petitioner James Dawson is a former Nicholas County Deputy Sheriff, a Deputy' U.S. Marshal, and a U.S. Marshal who retired from the U.S. Marshals Service on March 31, 2008. He began his federal employment in 1987.

2. During his tenure with the U.S. Marshals Service, Mr. Dawson was enrolled in the Federal Employee Retirement System (hereafter, the "FERS"). Under FERS, Mr. Dawson paid into social security and therefore, can receive social security benefits.

3. In October of 2013, Petitioners submitted amended tax returns for tax years 2010 and 2011, claiming a Schedule M adjustment exempting Mr. Dawson's retirement income for income tax purposes pursuant to West Virginia Code Section 11-21-12(c)(6).

4. On November 19, 2013, Respondent denied Petitioners the exemption. This refusal was predicated upon the Respondent's acquiescence to the ruling in the case of *Dodson v. Palmer* C.A. No. 00-C-AP-10 Monongalia County, West Virginia Circuit Court (2000).

5. In the *Dodson* decision, the Circuit Court of Monongalia County applied *Davis v. Michigan Department of Treasury*, 489 U. S. 803 (1989), and determined that under the doctrine of inter-governmental tax immunity, federal law enforcement officers, whose duties were not significantly different than those of a small group of retirees, namely West Virginia State police officers and firefighters, should receive the same tax exemption since both were unable to collect social security benefits. The Circuit Court of Monongalia County found that the only significant difference between Mr. Dodson and the state police officers and firefighters was the source of the pension payments or compensation.

6. Since the *Dodson* decision, this Tribunal has granted the exemption to only those federal law enforcement officers who retired and could not receive social security benefits. Those law enforcement officers, like Mr. Dawson, who retired under FERS and paid into social security were denied the exemption.

7. It has been shown in this proceeding that some of the state and local law enforcement officers who qualified for the tax exemption on their pensions, as set forth in West Virginia Code Section 11-21-12(c)(6), paid into social security and can collect social security benefits.

8. Petitioner began working as a West Virginia deputy sheriff in 1976 and left that employment in 1987. Mr. Dawson paid into social security while employed as a deputy sheriff.

9. Teresa Miller, Deputy Executive Director and Chief Operating Officer for the Consolidated Public Retirement Board (the "CPRB"), testified on behalf of the Respondent.

10. Mrs. Miller testified that the CPRB oversees nine (9) pension plans for the benefit of all State employees and some municipal employees.

11. Based upon the testimony of Mrs. Miller and the exhibits submitted by the Respondent, deputy sheriffs account for one-half of one-percent of all retired State employees for plan years 2010, 2011, and 2012.

12. Retired deputy sheriff's received an average monthly pension payment in the amount of $2,349.00 as of June 30, 2010, and $2,195.00 as of June 30, 2011. The average monthly salary paid to deputy sheriffs at the time of retirement was $3,659.00 as of June 30, 2010, and $3,722 as of June 30, 2011.

13. Mr. Dawson received an initial gross monthly retirement benefit of $3,926.00 when he retired in 2008 as a U.S. Marshal.

14. Deputy Sheriffs who retired under the Deputy Sheriffs' Retirement System in 2008 with comparable service, here twenty five (25) years, received an average monthly retirement benefit of $1,611.00.

15. According to the Petitioners, Mr. Dawson also receives a FERS Annuity Supplement of $801.00 per month since he retired prior to age 62. This

supplement will be discontinued once Mr. Dawson becomes eligible for social security benefits.

16. Mr. Dawson's monthly pension and FERS supplement total $56,724.00 per year.

17. Mr. Dawson testified that his pension was based upon the highest three-year average salary (also known as the "high-3") during his employment in the U.S. Marshal Service, which was $134,244.00 per year; however, that amount was adjusted downward due to his election to provide survivor benefits to his wife.

18. Mrs. Miller testified that to the best of her knowledge, no deputy sheriff was paid $100,000.00 or more per year.

19. Mr. Dawson receives more in pension benefits than West Virginia deputy sheriffs earn on average while on active duty. Further, Mr. Dawson receives more in retirement than do all West Virginia State troopers with the rank of first lieutenant and below while serving on active duty.

20. The parties have agreed that should Petitioners receive the pension exemption set forth in West Virginia Code Section 11-21-12(c)(6), the amount of their combined refund for tax years 2010 and 2011 would total $4,285.00. Applicable interest would be computed on that from the date the original claim for refund was received.

BURDEN OF PROOF

The governing law provides that in a hearing before the West Virginia Office of Tax Appeals, the taxpayer has the burden of proof. Further, it is well established that exemptions from taxation are strictly construed

against the person claiming the exemption. *See RGIS Inventory Specialists v. Palmer*, 209 W. Va. 152, 433 S.E.2d 79, Syl. Pt. 1 (2001).

DISCUSSION

As directed by Judge Swope's remand order, the primary issue for determination is whether West Virginia Code Section 11-21-12(c)(6) is consistent with Syl. Pt. 2 of the West Virginia Supreme Court's decision in *Brown v. Mierke*, 191 W. Va. 120 (1994), *cert denied sub nom Brown v. Paige*, 513 U.S. 877 (1994). The tax exemption under consideration is as follows:

> (c) *Modifications reducing federal adjusted gross income.* – There shall be subtracted from federal adjusted gross income to the extent included therein: . . . .
>
> (6) Retirement income received in the form of pension and annuities after the thirty-first day of December, one thousand nine hundred seventy-nine, under any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System, including any survivorship annuities derived from any of these programs, to the extent includable in gross income for federal income tax purposes;
>
> W. Va. Code § 11-21-12(c)(6).

In its remand Order, the Circuit Court found that *Brown v. Mierke*, is the applicable law governing this case. Specifically, the Circuit Court, quoting *Brown*, held that:

> Challenges to a state tax scheme under 4 U.S.C. § 111 can succeed only when one purpose of the challenged scheme is shown to discriminate against the officer or employee because of the source of pay or compensation. In determining whether such discrimination exists, a court will look to the totality of the circumstances to ascertain whether the intent of the scheme is to discriminate against employees or former employees of the federal government.

Remand Order at, *4–5, Par. 5 (quoting *Brown v. Mierke*, 191 W. Va. 120, Syl. Pt. 2 (1994)) (Emphasis in original).

At the outset, this Tribunal finds that the plain language of West Virginia Code § 11-21-12(c)(6) does not permit the Petitioner to take the above exemption because as the record reflects, Mr. Dawson is a retired United States Marshal rather than a retired West Virginia law enforcement official and thus, is not, under a plain reading of the statute, entitled to an exemption on his personal tax return.[1]

The Circuit Court of Mercer County directed this Tribunal to instruct that if either party believes that *Brown v. Mierke* is not determinative to the outcome of this matter, that party shall put forth the argument and support its alternative theory at the hearing before this Tribunal. Urging the Court to rely upon

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[1] Mr. Dawson, like most retirees from state employment, is entitled to a $2,000.00 exemption from State income tax. In addition to receiving equal treatment as compared with most retired State employees, Mr. Dawson receives better treatment than members of the judicial retirement plan and public sector employees.

Davis v. Michigan, 489 U.S. 803 (1989), the Petitioners here argue that the Respondent's denial of the exemption above to Petitioner amounts to a violation of 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity.

In essence, the Petitioners here argue that *Brown* conflicts with *Davis*, and thus, should be overruled. To the contrary, *Brown*, which involves the same exemption before this Tribunal, was decided nearly five years after *Davis* and in that case, the taxpayers there, who were unsuccessful, attempted to seek judicial review by the United States Supreme Court, which was denied. While this Tribunal is mindful that the denial of certiorari is not tantamount to an endorsement of the lower ruling, it tends to bolster the Respondent's argument that *Brown* does not conflict with *Davis*, and accordingly, should remain intact on appellate review.

Indeed, the Court's holding in *Davis* comports with the holding of the West Virginia Supreme Court in *Brown*. To that end, the *Davis* Court examined Michigan's blanket exemption of state worker's retirement income, in contrast with the lack of an exemption for state retirees. Michigan's exemption for state retirees, with no exemption for federal retirees, is quite different from the personal income tax exception under review sub judice, inasmuch as Michigan's blanket exemption for retirement income of state workers, in contrast with the lack of exemption for federal workers, evidences a clear intent to discriminate *against* federal workers, which is the primary reason that the Court struck down Michigan's statue in *Davis*. Thus, the totality of the circumstances in *Davis* demonstrated a clear intent to

discriminate against all federal employees. In contrast, such intent to discriminate was lacking in the tax scheme in *Brown* based on the statutory and factual differences. Accordingly, *Brown* neither ignores nor contradicts *Davis*.

More specifically, in the *Davis* case, unlike this case, the issue involved whether it is discriminatory to tax pensions paid to all federal employees where similarly situated state and local government retirees were exempt from such tax. The United States Supreme Court ruled in the affirmative, holding that the Michigan Income Tax Act violated the principles of intergovernmental tax immunity because it favored state and local retirees at the expense of federal retirees. *See Davis*, 489 U.S. 803, 817 (1989).

Subsequent to *Davis*, the West Virginia Supreme Court addressed this issue in *Brown v. Mierke*, 191 W. Va. 120, 443 S.E.2d 462 (1994), cert. denied *sub nom Brown v. Paige*, 513 U.S. 877 (1994).[2] In *Brown*, several retired United States military officers and enlisted personnel challenged the exemption in W. Va. Code §11-21-12(c)(6). The plaintiffs in *Brown* wanted the full amount of their pension income to be exempt from West Virginia state income tax in the same manner as retired state law enforcement officers and firefighters. The West Virginia Supreme Court of Appeals viewed the statutory framework in its

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[2] In 1994, Deputy Sheriffs were not members of the law enforcement class who received a total exemption from personal income tax of their pension benefits. The State created the Deputy Sheriffs Retirement System in 1998 and added Deputy Sheriffs to the exception in West Virginia Code Section 11-21-12(c)(6) in 1998.

entirety when deciding the issue of intergovernmental tax immunity. To reiterate:

> Challenges to a state tax scheme under 4 U.S.C. § 111 can succeed only **when one purpose of the challenged scheme is shown to discriminate against the officer or employee because of the source of pay or compensation.** In determining whether such discrimination exists, a court will look to the totality of the circumstances to ascertain whether the intent of the scheme is to discriminate against employees or former employees of the federal government.

Brown v. Mierke, 191 W. Va. 120 (1994), Syl. Pt. 2. (Emphasis supplied). The Court went on to hold that:

> However, West Virginia's scheme differs from the Michigan and Kansas schemes invalidated by the Supreme Court in that there is no intent in the West Virginia scheme to discriminate against federal retirees; rather, the intent is to give a benefit to a very narrow class of former state and local employees.

Brown, at 124,467. (Emphasis in original).

The *Brown* Court focused on a very narrow class of "favored" retirees. In the case at hand, Teresa Miller, Deputy Executive Director and Chief Operating Officer for the Consolidated Public Retirement Board (the "CPRB"), testified that some deputy sheriffs belong to the Public Employee Retirement Plan, while the remainder are members of the West Virginia Deputy Sheriffs Retirement System. According to Respondent's Exhibits admitted to evidence in the hearing on this matter, the West Virginia Deputy

Sheriffs Retirement System had 250 retirees in the 2010 Plan Year, 272 retirees in the 2011 Plan Year, and 283 in the 2012 Plan Year. According to Mrs. Miller's testimony and the Respondent's Exhibits, deputy sheriffs constitute quite a small percentage of State retirees. More specifically, the testimony here reveals that retired deputy sheriffs comprise less than one half of one percent of all West Virginia State government retirees for the three plan years, while in *Brown*, the retirees comprised approximately four percent of all State retirees. *See Brown*, at 123, 465. Thus, the percentage of "favored" State retirees at issue here is less than half the percentage present in *Brown v. Mierke*.

Importantly, the Court's decision in *Brown* was based primarily upon three factors. As the Court explained,

> In the case before us, three facts conclusively demonstrate that no calculated plan exists to discriminate against retired military personnel based upon the source of their income: (1) retired military personnel are treated more favorably than West Virginians who have retired from civilian occupations; (2) retired military personnel are treated equally with all persons from the West Virginia Public Employees Retirement System and the West Virginia Teachers Retirement System; and (3) along with state employees and teachers, military retirees are treated substantially more favorably than persons retired from the West Virginia Judicial Retirement System.

Brown v. Mierke, 191 W. Va. 123, 125, 443 S.E.2d 462, 467 (1994) (emphasis added in bold; italics emphasis in original).

As the Respondent demonstrated through testimony and in briefing, the exemption here meets the three (3)-factor test enunciated by the West Virginia Supreme Court of Appeals. First, retired United State Marshals and all federal retirees are treated more favorably than State residents who retire from the civilian workforce. To be clear, West Virginia Code Section 11-21-12(c)(6) contains no exemption from personal income tax for individuals who retire from private industry. Further, U.S. Marshals and all federal retirees can exempt $2,000.00 in pension income from State taxation under West Virginia Code Section 11-21-12(c)(5). At the hearing in this matter, Mr. Dawson admitted that the Respondent allowed him to claim the exemption of $2,000.00 in pension income received by all federal retirees. Indeed, the Respondent notified the Petitioners, by letter dated November 15, 2013, that their request for an exemption of all income paid to Mr. Dawson was denied but that Mr. Dawson can exempt $2,000.00 from income as a federal retiree. Accordingly, Mr. Dawson was treated more favorably than all retirees from the civilian workforce.

Secondly, retired U.S. Marshals receive identical tax treatment as retired employees of the Public Employees Retirement System ("PERS) and Teachers Retirement System ("TRS") under State law. All federal retirees and all West Virginia State and local government retirees receive an exemption from State income tax for the first $2,000.00 of pension income. *See* W. Va. Code §11-21-12(c)(5). The Respondent's

Exhibit showing the Notice of Return Change from the Tax Department to the Petitioners reveals that the Respondent permitted a deduction of $2,000.00 in each year as a modification to Schedule M. Respondent's counsel represented to this Tribunal that lines 37 and 38 of the West Virginia personal income tax return, found on Schedule M, contain parallel exemptions, which authorize a deduction from income for $2,000.00 paid to West Virginia retirees and $2,000.00 paid to federal retirees. Thus, Mr. Dawson received the same deduction under the West Virginia income tax law as every State retiree receives under PERS and TRS.

Third, Mr. Dawson receives more in pension benefits than West Virginia deputy sheriffs earn on average while on active duty. Moreover, Mr. Dawson receives more in retirement than do all West Virginia State troopers with the rank of first lieutenant and below while serving on active duty. Finally, retired U.S. Marshals receive more favorable tax treatment than retirees from the West Virginia Judicial Retirement System who cannot claim the $2,000.00 exemption under West Virginia Code Section 11-21-12(c)(5). Additionally, unlike the facts in *Barker v. Kansas*, 203 U.S. 594 (1994), cited by Petitioners in their brief West Virginia adopted an exemption subsequent to *Brown*, which exempts the first $2,000.00 in retirement income paid to all members of the federal armed forces. *See* W. Va. Code §1 l-21-12(c)(7). Accordingly, the Tax Department has met the three factors, which the West Virginia Supreme Court of Appeals found to be conclusive in *Brown*.

Notably, Mr. Dawson testified at the hearing before this tribunal that his pension from the U.S. Marshal Service is calculated based upon the highest three-

year average salary he earned while working. The Petitioners' Exhibits reflect that Mr. Dawson's "high-3" average salary was $134,244.00 per year. Further, Mrs. Miller's uncontroverted testimony is that no active duty West Virginia deputy sheriff earns $100,000 or more per year.[3]

The West Virginia Supreme Court determined in *Brown v. Mierke*, 191 W. Va. 120 (1994), that whether a tax statute discriminates against an officer or employee based upon the source of that pay must be determined by an examination of the totality of the circumstances. *Brown*, at Syl. Pt. 2. As the Respondent aptly noted, the totality of circumstances before this Tribunal demonstrates that the exemption set forth in Code Section 11-21-12(c)(6) does not violate the principle of intergovernmental immunity or the *Davis* decision. The Taxpayers have failed to prove any intent by West Virginia to discriminate against federal retirees as espoused by the West Virginia Supreme Court in *Brown v. Mierke*.

It is well settled that Petitioners alone have the burden of proof to show that they are entitled to the exemption concerning the federal pension received by Mr. Dawson. *See* W. Va. Code § 11-10A-10(e). Further, it is a well-settled law that tax exemptions are strictly construed against the taxpayer claiming such exemption. *See Wooddell v. Dailey*, 160 W. Va. 65, 230 S.E.2d 466 (1976); *RGIS Inventory Specialists v. Palmer*, 209 W. Va. 152, 544 S.E.2d 79 (2001).

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[3] The Petitioners reliance upon and citation to the dicta contained in *Jefferson County, Alabama v. Acker*, 521 U.S. 423 (1999) is unpersuasive and easily distinguishable from the case at bar.

Petitioners argue that the tax exemption should be applicable to Mr. Dawson because of United States Supreme Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). The doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, provides that "[t]he United States consents to the taxation of pay or compensation for personal service by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against its officer employee because of the source of the pay or compensation.[4] In the case at hand, an examination of the totality of circumstances, as required by Syllabus Point 2 of *Brown v. Mierke*, simply do not evidence any intent to discriminate against Mr. Dawson because of his source of pay. Petitioners have not met their burden of proof. Based upon examination of the entire record and for all of the reasons contained herein, the Respondent's denial of the claimed refunds to the Petitioners was proper and is hereby AFFIRMED.

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[4] The doctrine of inter-governmental immunity was also applied in *Barker v. Kansas*, 503 U.S. 594 (1992), to invalidate a *Kansas* tax scheme which sought to tax military retirees, while at the same time exempting all state and local pensions, as well as most federal pensions. The Court again found that the *Kansas* scheme failed to pass the test of "whether the inconsistent tax treatment is directly related to, and justified by significant differences between the two classes." *Id.*

CONCLUSIONS OF LAW

1. In hearings conducted by the West Virginia Office of Tax Appeals, the taxpayer has the burden of proof.

2. It is well settled that all tax exemptions are strictly construed against the taxpayer claiming the exemption. *Wooddell v. Dailey*, 160 W. Va. 65, 230 S.E.2d 466 (1976); *RGIS Inventory Specialists v. Palmer*, 209 W.Va. 152, 544 S.E.2d 79 (2001).

3. Under the principles of intergovernmental immunity, the United States Supreme Court struck down as discriminatory under 4 U.S.C. § 111, a tax scheme that taxed all federal pensions which at the same time exempted all state pensions. *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989).

4. In *Dodson v. Palmer*, C.A. No. 00-C-AP-10 (Monongalia County Circuit Court W. Va. 2000), the Court applied *Davis*, finding that West Virginia Code Section 11-21-12(c)(6) was unconstitutional as applied to that appellant.

5. The West Virginia Supreme Court of Appeals did not find *Davis* controlling in *Brown v. Mierke*, 191 W. Va. 120,443 S.E.2d 462 (1994). The test to determine whether the tax scheme is discriminatory against an officer or employee is not merely because the source of the compensation is different, but rather, because of the totality of the circumstances which are present. Those circumstances determine whether the intent of the scheme is to discriminate against employees and former employees of the federal government.

6. In *Brown*, "totality of the circumstances" meant that there was no intent to discriminate where military retirees, who constituted less than four percent of all State government retirees, were actually treated more favorably than those retired from civilian occupations, as well as retired state employees and teachers, and where such retirees were treated substantially more favorably than those persons retired from the West Virginia Judicial Retirement System.

7. Retired U.S. Marshals, like the military retirees in *Brown*, were treated more favorably than retirees from the West Virginia civilian workforce, as equally as persons retired from the West Virginia Public Employees Retirement System and the West Virginia Teachers Retirement System, and more favorably than retirees from the West Virginia Judicial Retirement System. Therefore, the intent of the West Virginian scheme was not to discriminate against federal retirees but rather to give a very narrow benefit to former state and local employees.

8. Mr. Dawson's source of pay or compensation alone, absent a showing of other circumstances required by *Brown v. Mierke*, do not provide sufficient evidence that the exemption at issue is discriminatory as applied to Petitioners.

9. Based upon the specialized circumstances found in *Brown*, we do not find that our decision conflicts with the holding in *Davis*, where a blanket exemption of all state and local employee pensions, while at the same time taxing federal retiree pensions, evidenced Michigan's intent to discriminate.

10. West Virginia Code Section 11-21-12(c)(6), as applied to the Petitioners, complies with Syl. Pt. 2 of the West Virginia Supreme Court decision in *Brown v Mierke*.

11. Petitioners have not met their burden of proof, as set forth in W. Va. Code § 11-10A-10(e), which requires a showing that they are entitled to the strictly construed tax exemption contained in West Virginia Code Section 11-21-12(c)(6).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the Petitioners' petition for refund of West Virginia personal income tax for the tax years 2010 and 2011 in the amount of $4,285.00 should be and is hereby **DENIED**.

WEST VIRGINIA
OFFICE OF TAX
APPEALS

By: /s/ Heather G. Harlan
Heather G. Harlan[5]
Chief Administrative
Judge

By: /s/ George V. Piper
George V. Piper
Administrative Law
Judge

August 7, 2015
Date Entered

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[5] Chief Administrative Law Judge, A. M. "Fenway" Pollack, heard this matter, however, he is no longer with the West Virginia Office of Tax Appeals. Judge Piper, who wrote portions of this decision, attended the January 23, 2015 evidentiary hearing. Chief Administrative Law Judge Heather G. Harlan was appointed subsequent to the evidentiary hearing on this matter and wrote the majority of this decision.

APPEAL PROCEDURES

Any aggrieved party may appeal from this decision with an appropriate West Virginia circuit court within sixty days of the date of service of the decision in accordance with the procedure set forth at West Virginia Code Section 11-10A-19. The Office of Tax Appeals may not be named as a party to the appeal, but must be provided with a copy of the filed petition for judicial review.

West Virginia Code Section 11-10A-19(e) also provides that if the appeal is of an assessment, except a jeopardy assessment for which security in the amount thereof was previously filed with the Tax Commissioner, then within ninety days after the petition for appeal is filed, or sooner if ordered by the circuit court, the petitioner shall file with the clerk of the circuit court a cash bond or a corporate surety bond approved by the clerk.

Within fifteen (15) days after receipt of this written notice of the appeal from the appellant, or within such further time as the circuit court may allow, the West Virginia Office of Tax Appeals will prepare and transmit to the circuit court a certified copy of the entire record in the matter. The West Virginia Office of Tax Appeals will, at the time of transmittal to the Circuit Court: (1) send to the parties a detailed index of the record; (2) send to the appellant a bill, payable within thirty days, for the reasonable costs of preparing the record; and (3) upon payment of such record preparation costs, send to the parties a certified copy of the entire record. Information about this procedure is available in the Rules of Practice of

Procedure before the West Virginia Office of Tax Appeals, at W.Va. C.S.R. § 121-1-86.

IN THE CIRCUIT COURT OF MERCER COUNTY,
WEST VIRGINIA

DAWSON, JAMES D. and
ELAINE F.,

Petitioners,

v.

MATKOVICH, MARK W.,
as ACTING STATE TAX
COMMISSIONER of
WEST VIRGINIA

Respondent

Civil Action
No. 15-C-326
Honorable
William J.
Sadler

PETITIONERS' BRIEF

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* * *

seriously contended that § 11-21-12(c)(6) properly excludes all federal law enforcement officers due to significant differences between them and the listed state/local law enforcement officers. Indeed, the OTA has been awarding the exemption in § 11-21-12(c)(6) to some federal law enforcement officers (i.e. those who retire under CSRS) for over 14 years, and the Tax Department did not appeal any of these awards. The Tax Department and the OTA cannot credibly now take the position that there are significant differences between federal law enforcement officers and state/local law enforcement officers which justify excluding federal law enforcement officers from the benefits of § 11-21-12(c)(6). Thus, because § 11-21-12(c)(6) treats state and local law enforcement retirees more favorably than federal law enforcement retirees, but is not directly related to, and justified by, significant differences between the two classes, the statute violates the constitutional doctrine of intergovernmental tax immunity.

III. The OTA erred to the extent it found § 11-21 -12(c)(6) constitutional based on the purported income differential between state and local law enforcement officers and their federal counterparts.

In its final decision, the OTA found that state and local law enforcement officers make less money and receive less in retirement benefits than their federal counterparts, such as Petitioner Dawson. To the extent that this finding informed the OTA's ultimate decision, a substantially similar position was rejected by the United States Supreme Court in *Davis*. There, the State of Michigan argued that its retirement benefits are significantly less munificent than those

offered by the federal government, and that this substantial difference should justify inconsistent tax treatment. *Davis*, 489 U.S. at 816. The Supreme Court rejected the state of Michigan's argument, observing that

> [w]hile the average retired federal civil servant receives a larger pension than his state counterpart, there are undoubtedly many individual instances in which the opposite holds true. A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees.

Id. at 817.

The same rationale holds true in the case at bar. First, while many federal law enforcement officers may earn more than their state counterparts, there are undoubtedly many individual state law enforcement officers who are paid more than some federal law enforcement officers. The OTA makes much out of the fact that Petitioner James Dawson earned over $100,000 per year towards the end of his career with the U.S. Marshals Service, but not every federal law enforcement officer earns that level of salary. Indeed, Petitioner himself earned far less for much of his career with the U.S. Marshals Service. Petitioner testified that he joined the U.S. Marshals Service in 1987. *See* Doc. No. 11, p. 12. As his Social Security Statement demonstrates, Petitioner only earned $29,131 in 1988. *See* Doc. No. 12 at Exhibit 2. Five years later in 1993, his salary was still just

$46,302. *See* id. There were undoubtedly state law enforcement officers who earned more than Petitioner during this time period.

Second, many retired West Virginia State Troopers actually collect *more* in retirement benefits than Petitioner Dawson collects.[1] When Petitioner Dawson retired in 2008, he received a gross pension of $3,926 per month, plus a temporary supplement of $801 per month (which will be discontinued once Mr. Dawson becomes eligible for Social Security), for a combined total gross amount of $4,727 per month. *See* Doc. No. 12 at Exhibit 5. According to the Tax Department's own exhibits, the average monthly retirement benefit for West Virginia State Troopers enrolled in Plan A was $5,534 in 2010. *See* Doc No. 13 at Exhibit 4, p. 28.[2] Not only that, but West Virginia State Troopers enrolled in Plan A get an annual increase of 3.75% in

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[1] In discussing the purported differences in pay and retirement benefits, the OTA focuses almost exclusively on the amounts received by deputy sheriffs. Again, § 11-21-12(c)(6) applies to more than just deputy sheriffs. Thus, to the extent that differences in pay and retirement benefits have any relevance, the amounts received by all retirees mentioned in § 11-21-12(c)(6) should be considered, not just the amounts received by deputy sheriffs.

[2] As indicated by the Tax Department's hearing exhibits 1-3, and set forth in W. Va. Code § 15-2-27, West Virginia State Troopers who retire under Plan A are entitled to an annual benefit equal to 5.5% of their aggregate salary during their entire period of service, payable in equal monthly installments. *See also* https://www.wvretirement.com/PlanA.html. To illustrate, a trooper who works at an average salary of $50,000 over the course of 25 years could collect an initial retirement benefit of $68,750 per year, or $5729.16 per month, which is substantially more than Petitioner receives in benefits.

their retirement benefits, meaning that they have the potential to collect substantially more in retirement benefits than Petitioner Dawson collects as years pass. *See* W.Va. Code§ 15-2-27a; *see also* Doc. No. 13 at Exhibits 1, 2, and 3.[3]

Third, as recognized in *Davis*, a tax exemption truly intended to account for differences in salary or retirement benefits would not discriminate on the basis of the source of income, but would discriminate on the basis of the amount of salary and/or benefits received by individual law enforcement officer retirees. The West Virginia Legislature chose to draft § 11-21-12(c)(6) so that eligibility was based on the source of a retiree's compensation, rather than on the amount of salary or benefits received. Thus, as in *Davis*, the statute violates the doctrine of intergovernmental tax immunity.

Finally, the notion that § 11-21-12(c)(6) is justified by the difference in pay scales between federal and state law enforcement officers is belied by the fact that the OTA allowed the benefits of § 11-21-12(c)(6) to many federal law enforcement officers (i.e. those who retired under CSRS) for over 14 years. Given that the OTA extended § 11-21-12(c)(6) to some federal enforcement officers for over a decade, the OTA cannot credibly take the position that § 11-21-12(c)(6) is justified by the difference in pay scales between federal and state law enforcement officers.

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[3] Many of the Tax Departments hearing exhibits, as reproduced by the OTA in Doc. No. 13, are difficult if not impossible to read. Petitioners can produce readable copies of these documents upon request.

IV. In addition to the facial invalidity of W. Va. Code § 11-21-12(c)(6), the OTA has been applying the statute in an unconstitutional manner.

As the West Virginia Supreme Court of Appeals has recognized, even otherwise valid statutes can be unconstitutionally applied. *See Kolvek v. Napple*, 212 S.E.2d 614, 619 (W.Va. 1975)("[A] statute may be valid on its face but unconstitutionally applied."). Where economic rights are concerned, the West Virginia Supreme Court of Appeals has held that a classification violates the equal protection clause of the West Virginia Constitution where there is no rational basis for the classification. *See Whitlow v. Bd. of Educ. of Kanawha Cnty.*, 438 S.E.2d 15, 20 (W.Va. 1993).

Here, the OTA has long-treated federal law enforcement officers who retire under CSRS more favorably than federal law enforcement officers who retire under FERS without a rational basis. Since the Monongalia County Circuit Court's ruling in *Dodson*, the OTA has allowed the exemption in § 11-21-12(c)(6) to federal law enforcement officers who cannot collect Social Security benefits (CSRS retirees), but denied it to federal law enforcement officers who can collect Social Security benefits (FERS retirees). The OTA's basis for doing this was the *Dodson* court's unsupported observation that the purpose behind § 11-21-12(c)(6) was to benefit state law enforcement officers and firefighters who were unable to collect Social Security benefits.

* * *

IN THE CIRCUIT COURT OF
MERCER COUNTY, WEST VIRGINIA

JAMES D. and ELAINE F. DAWSON,
Petitioners,

vs. **CIVIL ACTION NUMBER:**
15-C-326-WS

MARK W. MATKOVICH,
STATE TAX COMMISSIONER
OF WEST VIRGINIA,
Respondent.

TRANSCRIPT of proceedings in the above-styled action held on Monday, March 14, 2016, before Judge William J. Sadler, Mercer County Circuit Court, Princeton, West Virginia, as recorded in Electronic Recording by Margaret Bryant, Electronic Recording Operator of said court, commencing at 10:54 AM.

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Tax Division

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Mr. Pogue, you may proceed.

MR. POGUE: Well, Your Honor, I don't know if you have any questions. Our position is pretty much what is in our brief.

But, to summarize, uh, Mr. Dawson is a retired U. S. Marshall and Deputy Marshall. He tried to claim the exemption in West Virginia Code §11-21-12(c)(6), which applies to State and local law enforcement officers. He tried to exempt his retirement income under that section. And, he was denied.

Now, to understand why he attempted to claim this exemption that on it's face only applies to State and local law enforcement officers, I need to know little bit about the history of how this exemption has been handled in the past.

In the year 2000, the Circuit Court of Monongalia County decided a case called *Dodson v. Palmer*. And, in that case, Judge Stone up in Morgantown ruled that the statute, §11-21-12(c)(6) was unconstitutional in its exclusion of federal law enforcement officers who could collect Social Security. And, his reason for limiting it to federal law enforcement officers who cannot collect

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Social Security—

THE COURT: Is that the difference between the CSRS and the FERS?

MR. POGUE: Right. Essentially, CSRS guys, well retirees can, I'm sorry—

THE COURT: Do not collect Social Security.

MR. POGUE: Right, do not collect Social Security. And, FERS retirees can collect Social Security when they reach the appropriate age.

So, —

THE COURT: Now are both of these retirement systems open to federal employees other than law enforcement?

MR. POGUE: Yes.

THE COURT: Okay. Alright. You may proceed.

MR. POGUE: So, ever since that case was decided in the year 2000, the Office of Tax Appeals has basically granted the exemption to all federal law enforcement officers who do not participate in Social Security.

So, it's basically given it to all the CSRS

guys and denied it to all the FERS retirees.

This has been going on, like I said, for over a decade. But, it's now undisputed I believe that section §11-21-12(c)(6) is not based on Social Security because deputy sheriff's are on the face of the statute entitled to that exemption, yet, they do participate in Social Security. So denying it to some federal law enforcement officers and giving it to others on the basis of Social Security can't continue because that's not the basis for the, not the criteria for the exemption.

So, we filed this action so that we could put a stop to this irrational discrimination basically against FERS retirees. And, the State is now or the Tax Department is now taking the position that no federal retirees are

entitled to the exemption in §11-21-12(c)(6) regardless of whether they can collect Social Security or not.

Now, to understand why we think that all federal law enforcement officers should get this exemption, we needed to talk a little bit about the doctrine, the constitutional doctrine of inter-governmental tax immunity, in a case called *Davis versus Michigan*. It's United States Supreme Court

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Case discussed at length in our brief.

But, basically the supreme court ruled that in inter-governmental tax immunity cases, a tax that treats, a tax law that treats state employees more favorably than federal employees is unconstitutional unless the inconsistent tax treatment is directly related to and justified by significant differences between the two classes.

In our case, there really are no significant differences. They are all law enforcement officers. I know the Tax Department's position is there are some differences in the amount of income and benefits. And, I'll talk about that in a little more detail later. But, there is really no dispute that the job functions are essentially the same.

So, and like I said, over the past fourteen or fifteen years, the Office of Tax Appeals has given this exemption to all federal law enforcement officers except for the ones that can't, I'm sorry, that can participate in and recover Social Security benefits.

So, there is really no dispute but if you are a law enforcement officer, there is no big difference between duties between federal and state.

The only issue are some of these income amounts and other things.

So, the Tax Department has basically taking the position that instead of following the Supreme Court's decision, the United States Supreme Court's decision in *Davis*, that this Court should follow the West Virginia Supreme Court of Appeals' decision in a case called *Brown v. Mierke*. That case essentially held that... it didn't apply the *Davis*, United States Supreme—

THE COURT: They were, the military folks, retired military was trying to get the law enforcement exemptions.

MR. POGUE: Correct.

And, that's essentially the distinction that we would make, Your Honor. In that case, you were not talking about state law enforcement officers versus federal law enforcement officers. You were talking military versus law enforcement. So, it's not, the reason those people in *Brown* weren't entitled to the exemption wasn't simply that they were federal employees instead of state employees. It was that they didn't fit within the general class. They weren't law enforcement officers. It

is a completely different job description.

And, in fact, in *Brown*, the West Virginia Supreme Court of Appeals mentions twice the petitioners failed to demonstrate that their jab descriptions corresponded to the job descriptions of municipal firefighters, municipal police officers, and state police

officers. They refer to that once in the body of the opinion and then later when they decide, that the Supreme Court of Appeals decides it's not going to *(inaudible due to cough) and a footnote that says if nothing else, none of the petitioners before us has asserted that his or her job description was in anyway close to the job description of firemen or state and local policemen.

So, again, *Brown* was comparing apples to oranges. In this case, what we are dealing with is state apples versus federal apples. The only reason that Mr. Dawson does not get this exemption is that he is a federal employee and not a state employee.

And, that is precisely what the doctrine of inter-governmental tax immunity forbids, is discrimination based on the source, the federal source of a person's income.

Now, I know that the Tax Department is also

* * *

income of all law enforcement officers who make less than $60,000.00 or whatever. But, that is not what it does. What is does is exempt the retirement income of State people and not the federal people without any regard to what they are making.

And, as the Supreme Court noted in *Davis*, while maybe the average federal law enforcement officer does make more than the average State law enforcement officer. But, there are undoubtedly individual instances in which the opposite it true.

And, with regard to the amount of retirement benefits between State and federal retirees, law

enforcement retirees, State troopers in plan A actually receive more benefits than petitioner Dawson. And, petitioner Dawson is a Presidential, well he is a retired, presidentially appointed United States Marshall. So, he was pretty high up the pay scale in terms of fellow law enforcement officers. There are obviously people that qualify as federal law enforcement officers that did not make it to that level, that did not make as much as petitioner Dawson, and did not get as much in terms of retirement benefits as Mr. Dawson.

So, Your Honor, the Tax Department has

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IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

No. 16-0441

MARK W. MATKOVICH, as
State Tax Commissioner of West Virginia,

Respondent Below, Petitioner,

v.

JAMES DAWSON and ELAINE F. DAWSON,

Petitioners Below, Respondents.

RESPONDENTS' BRIEF

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James and Elaine F. Dawson

* * *

differences between the two classes." 489 U.S. at 816; *see also Barker*, 503 U.S. at 598. As demonstrated below, W. Va. Code § 11-21-12(c)(6) is neither directly related to, nor justified by, significant differences between state and federal law enforcement officers.

1. There are no significant differences between the powers and duties of federal law enforcement officers, such as Mr. Dawson, and state and local law enforcement officers.

The circuit court properly recognized that "it is undisputed in the present matter that there are no significant differences between Mr. Dawson's powers and duties as a U.S. Marshal and the powers and duties of the state and local law enforcement officers listed in § 11-21-12(c)(6)."App. Vol. I, pp. 4–5,[5] Indeed,

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[5] To the extent any argument on this point is necessary, it is beyond dispute that there are no significant differences between the powers and duties of federal law enforcement officers, like Mr. Dawson, and those of the state and local law enforcement officers listed in § 11-21-12(0)(6). First,§ 11-21-12(c)(6) expressly includes West Virginia deputy sheriffs, and by federal statute, "United States marshals [and] deputy marshals . . . in executing the laws of the United States within a State, *may exercise the same powers which a sheriff of the State may exercise* in executing the laws thereof." *See* 28 U.S.C. § 564 (emphasis added). Second, W. Va. Code § 15-10-5 gives federal law enforcement officers, including U.S. Marshals and deputy marshals, the authority to enforce the laws of the State of West Virginia where a felony is committed in their presence or where they are asked to provide assistance by a state or local law enforcement agency and/or officer. *See* W. Va. Code § 15-10-5. Third, Mr. Dawson testified at the January 23, 2015 hearing that he has been employed both as a West Virginia deputy sheriff and as a member of the U.S. Marshals Service, and that his duties in both occupations involved the investigation, apprehension, and detention of people

the Tax Department has acknowledged that "Mr. Dawson performed the same job function as State law enforcement officers." *See* App. Vol. I, p. 42–43. Moreover, the Tax Department has never argued in this matter that § 11-21-12(c)(6) is related to, and/or justified by, significant differences in the powers and duties of federal and state law enforcement officers. Instead, the Tax Department relies solely on purported differences in the amount of salary and retirement benefits received by state and federal law enforcement officers to attempt to justify § 11-21-12(c)(6).

2. ***The statute is not directly related to and/or justified by the purported income differential between state and local law enforcement officers and their federal counterparts.***

The Tax Department argues that § 11-21-12(c)(6) passes the *Davis* test in this case because Mr. Dawson earned a higher salary and receives more munificent retirement benefits than the state and local retirees who qualify for the exemption. However, as the circuit court correctly recognized, the United States Supreme Court rejected this very notion in *Davis*. There, the State of Michigan argued that its retirement benefits are significantly less munificent than those offered by the federal government, and that this substantial difference should justify inconsistent tax treatment.

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suspected or convicted of crimes. *See* App. Vol. III, pp. 11–13. It is axiomatic that the duties of other state and local law enforcement officers listed in § 11-21-12(c)(6), such as West Virginia State Troopers, also involve the investigation, apprehension, and detention of people suspected or convicted of crimes.

Davis, 489 U.S. at 816. The Supreme Court rejected this argument, observing that

> [w]hile the average retired federal civil servant receives a larger pension than his state counterpart, there are undoubtedly many individual instances in which the opposite holds true. A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees.

Id. at 817. Thus, the Tax Department cannot rely on purported differences in the *amount* of compensation and retirement benefits to justify a statute that, on its face, discriminates on the basis of the *source* of compensation and retirement benefits. As the circuit court observed, "[h]ad the West Virginia Legislature intended § 11-21-12(c)(6) to account for differences in income instead of differences in the source of income, it easily could have done so." App. Vol. I, p. 6.

The Tax Department attempts to get around this portion of *Davis* by arguing that the U.S. Supreme Court rejected reliance on the *average* difference in value between state and federal retirement benefits, whereas in the case at bar the Tax Department relies on difference between the retirement income of Mr. Dawson specifically (as the challenging taxpayer) and that of the class of state and local retirees listed in § 11-21-12(c)(6). There is no merit to this argument. The *Davis* test asks whether disparate tax treatment is "directly related to, and justified by, 'significant differences between the two classes,'" rather than

focusing the on the specific challenging taxpayer. *See* 489 U.S. at 816 (emphasis added). It is absurd to say that the statute properly excludes Mr. Dawson because he, specifically, earned too much income or receives too much in retirement benefits, given that the statute says absolutely nothing about amount of income or retirement benefits.

Indeed, in the Tax Department's own words, the reason that Mr. Dawson (a retired federal law enforcement officer) does not qualify for the exemption in W. Va. Code § 11-21-12(c)(6) is that he is "not a retired *West Virginia* law enforcement official." *See* App. Vol. I, p. 31 (emphasis added). The statute, by its plain language, bases eligibility for the exemption on the *source* of a law enforcement officer's retirement benefits. As such, it is not Mr. Dawson's income level that disqualifies him; it is the federal (as opposed to state) source of his retirement benefits. Even if Mr. Dawson, as a federal law enforcement officer, had been paid less than many state law enforcement officers, and his retirement benefits were no more munificent than those of most state and local law enforcement officers, he still would not qualify for the exemption. Plainly, the criterion that determines a law enforcement officer's eligibility under the statute is the source of his or her retirement income, rather than the amount of his or her income.

In addition, the Tax Department's presentation of the data regarding the purported differences in the compensation and retirement benefits of state and federal law enforcement officers is misleading in several respects. First, the Tax Department argues that Petitioner Dawson's "high-3" average salary (the highest average salary during any three year period of

federal employment) was $134,244, while no West Virginia deputy sheriff earns $100,000 or more per year. Even if a difference in *amount* of salary were a valid reason for discriminating based on the *source* of that salary (which it is not), the appropriate comparison would not be whether Mr. Dawson, individually, at the peak of his employment, earned more money than West Virginia deputy sheriffs. Again, the *Davis* test asks whether disparate tax treatment is "directly related to, and justified by, 'significant differences between the two ***classes***.'" *See* 489 U.S. at 816 (emphasis added). The classes at issue here are federal law enforcement officers, on the one hand, and the state and local law enforcement officers (and firefighters) whose retirement income is exempt from taxation under W. Va. Code § 11-21-12(c)(6), on the other hand.

Accordingly, the Tax Department cannot single out Mr. Dawson's income among all federal law enforcement officers, and cannot compare it solely to the income of deputy sheriffs, as opposed to the other state and local law enforcement officers included in § 11-2112(c)(6). While Mr. Dawson's former job as a U.S. Marshal and deputy marshal may be most analogous to that of a deputy sheriff out of all the law enforcement officers included in § 11-21-12(c)(6), the class of state law enforcement officers embraced by the statute includes far more than just sheriffs. For example, the statute also exempts the retirement income of state police, and state police have a higher average salary than deputy sheriffs. *See* App. Vol. I, p. 632.

Furthermore, to the extent that Mr. Dawson's "high-3" average salary also exceeds the salary of any

West Virginia State Trooper, Mr. Dawson's "high-3" average salary is not indicative of the income of all federal law enforcement officers. Mr. Dawson served as a deputy U.S. Marshal for 15 years before being presidentially appointed to the position of U.S. Marshal, which he held for an additional six years. App. Vol. III, p. 12. Not all deputy U.S. Marshals reach the position of U.S. Marshal and earn the level of salary and benefits that Mr. Dawson earned, and not all federal law enforcement officers in other branches of service reach positions equivalent to U.S. Marshal. Mr. Dawson himself earned far less than his "high-3" average salary for much of his federal law enforcement career. Mr. Dawson testified that he entered the U.S. Marshals Service in 1987, and as his Social Security statement demonstrates, during his first five full years as a federal law enforcement officer (1988–1992), he earned between $29,131 and $44,491. *See* App. Vol. I, p. 322; App. Vol. III, p. 12. There were undoubtedly state law enforcement officers who earned more than Mr. Dawson during this time period. Thus, the Tax Department's comparison between Mr. Dawson's "high-3" salary and the salaries of deputy sheriffs and/or state police does not paint an accurate picture of whatever difference exists, if any, between the compensation of federal law enforcement officers in general and the compensation of the state and local law enforcement officers included in § 11-21-12(c)(6).

Second, the Tax Department argues that Mr. Dawson receives substantially more in retirement benefits than any deputy sheriff receives under the West Virginia Deputy Sheriff Retirement System. Again, not all federal law enforcement officer's reach

positions with salary and retirement benefits equivalent to those of Mr. Dawson's as a U.S. Marshal, and it is inappropriate to compare the retirement income of federal law enforcement officers solely with that of deputy sheriffs out of all of the state and local law enforcement officers who are covered by § 11-21-12(c)(6).

Third, in apparent recognition of the fact that it is inappropriate to focus solely on deputy sheriffs, the Tax Department argues that Mr. Dawson's retirement benefits are greater than the *active duty salary* of most West Virginia Troopers. This argument too ignores the fact that not all federal law enforcement officers reach positions with salary and benefits equivalent to those of Mr. Dawson's. However, the most notable thing about this argument is that Tax Department compares Mr. Dawson's *retirement benefits to the active duty salaries* of West Virginia State Troopers, rather than to the retirement benefits of West Virginia State Troopers.[6] Perhaps the reason for this is that many West Virginia State Troopers actually receive more in, retirement benefits than Mr. Dawson receives (and therefore substantially more than federal law enforcement officers whose careers never advanced as far as Mr. Dawson's receive).

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[6] While the Tax Department asserts in its Summary of Argument, on page seven of its brief, that "Dawson's retirement benefits under FERS are significantly more munificent than the retirement benefits received by any state retiree who qualifies for the exemption under (c)(6)," the body of the Tax Department's brief is wholly devoid of any data purporting to show that Mr. Dawson's retirement benefits under FERS are more munificent than the retirement benefits received by West Virginia State Troopers under their retirement systems.

To elaborate, when Mr. Dawson retired in 2008, he received a gross benefit of $3,926 per month plus a temporary supplement of $801 per month (which will be discontinued once he becomes eligible for Social Security), for a combined total gross amount of $4,727 per month. *See* App. Vol. I, p. 335. By 2010, that combined gross total had slightly increased to $4,852 per month. *See* App. Vol. III, pp. 38–39.[7] The Tax Department's own exhibits indicate that the *average* monthly benefit for West Virginia State Police retirees enrolled in Plan A was $5,534 in 2010, which is more than Mr. Dawson collected and undoubtedly more than other retired federal law enforcement officers who did not reach a position equivalent to U.S. Marshal collected. *See* App. Vol. I, p. 632. Furthermore, the fact that the average monthly benefit for West Virginia State Police retirees enrolled in Plan A was $5,534 means that some State Police retirees in Plan A receive a monthly benefit that is *higher* than $5,534.[8] If these state law enforcement

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[7] Mr. Dawson testified that his gross distribution for the year 2010 was $58,224, which breaks down to $4,852 per month. App. Vol, III, pp. 38–39. If the $801 temporary supplement is subtracted, this means that Mr. Dawson's gross retirement benefit was $4,051 in 2010.

[8] Similarly, the *average* monthly benefit for West Virginia State Police retirees enrolled in Plan B was $3,684, meaning that some State Police retirees in Plan B receive a monthly benefit that is substantially higher than $3,684. App. Vol. I, p. 632. Given that this *average* amount of $3,684 is only about $360 less than Mr. Dawson's gross retirement benefit of $4,051, and that many retired federal law enforcement officers do not reach the level of salary and benefits attained by Mr. Dawson, there are undoubtedly State Police retirees in Plan B who receive more in

retirees receive more in retirement benefits than Mr. Dawson, who was presidentially appointed to the position of U.S. Marshal, then they undoubtedly receive more than many federal law enforcement retirees.[9]

Finally, the notion that § 11-21-12(c)(6) is directly related to and justified by the difference in pay scales between federal and state law enforcement officers is belied by the fact that the OTA has given exemption in § 11-21-12(c)(6) to many federal law enforcement officers (i.e. those who retired under CSRS) for over 15 years without any opposition from the Tax Department. Given that the Tax Department has passively allowed the OTA to extend § 11-21-12(c)(6) to some federal law enforcement officers for well over a decade, the Tax Department cannot credibly take the position that the statute properly excludes all federal law officers because they make too much money and/or receive too much in retirement benefits.

3. The circuit court's ruling that § 11-21-12(c)(6) violates the doctrine of intergovernmental tax immunity is correct regardless of whether said ruling is consistent with the purpose of the statute.

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retirement benefits than many retired federal law enforcement officers.

[9] In addition, it should be noted that West Virginia State Troopers enrolled in Plan A get an annual cost of living increase of 3.75% in their retirement benefits, meaning that they have the potential to collect *much more* in retirement benefits than Petitioner Dawson collects (and much more than other retired federal law enforcement officers collect) as years pass. *See* W. Va. Code § 15-2-27a; *see also* App. Vol. I, pp. 596, 599, 602.

The Tax Department argues that the circuit court's decision is inconsistent with the Legislature's, purpose in enacting § 11-21-12(c)(6). However, under the Tax Department's own interpretation, the Legislature's purpose in enacting the statute was to provide a benefit to state and local law enforcement officers to the exclusion of federal law enforcement officers like Mr. Dawson. Indeed, according to the Tax Department, a senate bill was introduced in the 2016 Legislative Session which would have expanded § 11-21-12(c)(6) to include federal law enforcement officers,

* * *

Retirement System; and (3) retired military personnel are treated more favorably than persons retired from the West Virginia Judicial Retirement System. *Id.* at 125, 443 S.E.2d at 467. At the conclusion of its opinion, the Court again explained its decision not to apply the *Davis* test by stating that "[i]f nothing else, none of the petitioners before us has asserted that his or her job description was in any way close to the job description of firemen or state and local policemen." *Id.* at 125, 443 S.E.2d at 467, n. 2.

Thus, *Brown* dealt with inconsistent tax treatment between two classes of retirees that, in the Court's view, had completely different jobs: the state/local law enforcement officers listed in W. Va. Code § 11-21-12(0(6), and *military personnel.* As such, the reason that the petitioners in *Brown* did not qualify for the exemption in § 11-21-12(c)(6) was not simply that they were *federal* rather than *state* employees, but that they were *not law enforcement officers or firefighters.* By contrast, the case at bar addresses inconsistent tax treatment between state/local *law enforcement officers*

and federal *law enforcement officers*. Mr. Dawson is a retired *law enforcement officer*, and the only reason he is not covered by the statute is that he is a retired *federal* law enforcement officers rather than a retired *state or local* law enforcement officer. This type of inconsistent tax treatment based on the *source* of Mr. Dawson's retirement income is *precisely* the type of discrimination that the doctrine of intergovernmental tax immunity forbids, and to which the test established in *Davis* and *Barker* applies[11]. Because the case at bar does not involve the same "specialized circumstances" as *Brown*, the circuit court correctly determined that *Brown* does not apply.

B. To the extent that *Brown* can be read to apply beyond the narrow circumstances of that case, *Brown* is superseded by clear U.S. Supreme Court precedent establishing the test for determining whether a statute violates the doctrine of intergovernmental tax immunity.

As the circuit court properly recognized, on issues of federal law (such as whether a statute violates the

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[11] The Tax Department argues that this was not the "key distinction" in *Brown*, yet the Court repeated *twice* in explaining why it was not applying the test from *Davis* and *Barker* that the military retirees at issue had not demonstrated or asserted that their job descriptions were similar to those of the state and local police and firefighters listed in W. Va. Code § 11-21-12(c)(6). *See* 191 W. Va. at 123, 125, n.2, 443 S.E.2d at 465, 467, n.2. Moreover, as set forth in greater detail *infra*, to the extent that this is not the "key distinction" in *Brown*, and *Brown* can be read to apply even to classes of federal and state employees with the same or similar job descriptions, *Brown* is superseded by *Davis* and its progeny.

federal constitutional doctrine of intergovernmental tax immunity), state courts are bound by the decisions of the United States Supreme Court, and the decisions of a state's highest court must yield to decisions of the United States Supreme Court. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012)("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established."); *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220–21(1931)("The determination by this court of [a question of federal law] is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding."); *State ex rel Battle v. B. D. Bailey & Sons, Inc.*, 150 W. Va. 37, 42–43, 146 S.E.2d 686, 690 (1965)("Another principle we are required to bear in mind in this case is that, in considering whether a state law violates the commerce clause of the Constitution, this Court must yield to decisions of the Supreme Court of the United States. . . . The Supreme Court of the United States, therefore, is the final arbiter in relation to the constitutionality of state statutes in the light of the commerce clause of the Constitution.").

In the case at bar, United States Supreme Court precedent is clear that tax statutes cannot treat state employees more favorably than similarly situated federal employees based on the source of their compensation without running afoul of the doctrine of intergovernmental tax immunity. *See Davis*, 489 U.S. at 815–17; *Acker*, 527 U.S. at 442–43. United States Supreme Court precedent is equally clear that the inquiry to be applied in intergovernmental tax immunity cases is "whether the inconsistent tax

treatment is directly related to, and justified by, significant differences between the two classes.'" *See Davis*, 489 U.S. at 816; *Barker*, 503 U.S. at 598. However, as discussed above, this Court did not apply the *Davis* test in *Brown*. Instead, the Court concluded that the "specialized circumstances" present in *Brown*, including the fact that there was no similarity in the job duties of the two classes at issue, justified the application of a different test. *See* 191 W. Va. at 123–125, 443 S.E.2d at 465467.

To the extent the Tax Department is correct that *Brown* was intended to apply broadly to all intergovernmental tax immunity cases, including those (like the case at bar) involving state and federal employees with substantially similar job descriptions, *Brown* is superseded by *Davis* and its progeny. Again, the United States Supreme Court has announced, in no uncertain terms, the test to be applied in intergovernmental tax immunity cases, and the United States Supreme Court is the ultimate authority on this issue. Because a state court may not contradict or fail to implement a rule established by the United States Supreme Court on an issue of federal law, *Brown* cannot properly be read to broadly replace the test established by the United States Supreme Court in *Davis* and its progeny. As such, the circuit court correctly determined that the test established by the United States Supreme Court in *Davis* and its progeny, rather than the test set forth by this Court in Brown, controls the outcome of this case.[12]

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[12] It is true that *Brown* was decided after *Davis* and that United States Supreme Court denied certiorari with respect to

C. The *Brown* factors, as applied to the facts of this case, do not make sense, and would allow precisely the type of discrimination that the doctrine of intergovernmental tax immunity prohibits.

The Tax Department argues that, if the Dawsons cannot prove a legislative intent to discriminate *against* federal law enforcement officers (as opposed to an intent to *favor* a narrow class of state and local employees) by satisfying the factors discussed in *Brown*, then § 11-21-12(0)(6) is constitutional.[13] The fallacy of this argument becomes clear if one analogizes to other constitutionally prohibited classifications, such as gender. It is axiomatic that a statute would be unconstitutional if it exempted the retirement income of *male* law enforcement officers, but not the retirement income of *female* law

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Brown. However, as the Tax Department has acknowledged, this does not constitute a finding by the United States Supreme Court regarding the correctness of *Brown*. There could be many reasons why the Court denied certiorari. One obvious reason is that the ultimate outcome in *Brown* was correct under the facts of that case because, as discussed *supra*, § 11-21-12(c)6) only applies to law enforcement officers and firefighters, and the petitioners in *Brown* were neither law enforcement officers nor firefighters.

[13] With respect to the narrow class of beneficiaries at issue, the Tax Department notes that deputy sheriffs account for one half of one-percent of all retired State employees for the years 2010 through 2012. However, § 11-21-12(0(6) applies to more than just deputy sheriffs; it also exempts the retirement income of other branches of West Virginia raw enforcement officers, as well as firefighters. Thus, to the extent that the size of the class of retirees favored by the statute has any relevance, it is inappropriate to define the size of the class solely by the number of retired deputy sheriffs.

enforcement officers. It would not matter that male law enforcement officers are a small percentage of the population. It would not matter that female law enforcement officers are still treated more favorably than private sector employees or judges. It would not matter whether the specific intent was to favor male law enforcement officers, rather than to discriminate against female law enforcement officers. A statute drawn to favor those on one side of a prohibited classification necessarily discriminates against those on the other side.

The same rationale applies to a statute, such as § 11-21-12(c)(6), which treats state and local law enforcement officers more favorably than federal law enforcement officers based on the source of their compensation. While there may not be anything unlawful about providing favorable tax treatment to a narrow class of employees, the class must be drawn along constitutionally permissible lines. Just as a class cannot be drawn to favor one race or gender over another unless the classification passes a heightened level of scrutiny, the United States Supreme Court's decision in *Davis* and the principles discussed therein hold that a class cannot be drawn to favor retired state and local employees over retired federal employees unless the classification is directly related to, and justified by, significant differences between the two classes. *See* 489 U.S. 816–17. As the circuit court correctly recognized, even if the Legislature crafted § 11-21-12(0(6) specifically to benefit the narrow class of *state* law enforcement officers, this type of inconsistent tax treatment is "unquestionably based on the source their retirement income and precisely the type of favoritism the doctrine of

intergovernmental tax immunity prohibits." App. Vol. I, p. 5.

Furthermore, the fact that a group of taxpayers does not receive the absolute worst tax treatment of all possible classifications does not mean that they are not being discriminated against for some impermissible reason, such as the federal source of their compensation. A group can be treated *less favorably* for an impermissible reason without being treated the *least* favorably. Indeed, in *Davis*, the dissent argued that the tax at issue was constitutional because it "draws no distinction between the federal employees or retirees and the vast majority of voters in the State," and the U.S. Supreme Court *rejected* this argument. 489 U.S. at 815, n.4. Here, the statute at issue completely exempts the retirement income of state and local law enforcement officers, while giving federal law enforcement officers only a partial exemption. *See* W. Va. Code § 11-21-12(c)(5), (6))[14] The only criterion under the statute for determining whether a law enforcement officer gets the complete exemption or the partial exemption is enrollment in a state and/or local law enforcement retirement system, rather than a federal law enforcement retirement

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[14] More specifically, the statute allows federal law enforcement officers to exempt the first $2,000 of their retirement income. *See* W.Va. Code § 1 1-21-12(c)(5). State law enforcement officers such as state troopers get to exempt their entire retirement income, which in many cases is over $50,0000. By allowing state law enforcement officers to exempt upwards of $50,000, while allowing federal law enforcement officers to exempt only $2000, the statute plainly treats state law enforcement officers *substantially* more favorably than federal law enforcement officers.

system. Thus, while the statute does give federal law enforcement officers a partial exemption; the statute quite plainly taxes federal law enforcement officers more heavily than state and local law enforcement officers based on the federal source of their compensation, which is precisely the type of discrimination that doctrine of intergovernmental tax immunity forbids.

Despite the Tax Department's efforts to complicate it, the doctrine of intergovernmental tax immunity is quite simple: it prohibits tax laws which discriminate against federal employees based on the source of their compensation. Applying the *Brown* test to this and other cases which, unlike *Brown*, involve tax discrimination between federal and state employees who perform substantially similar job functions, would effectively allow precisely this type of discrimination. For this and all of the foregoing reasons, the test announced by the United States Supreme Court in *Davis* and its progeny, rather than the test applied by the this Court in *Brown*, controls the outcome of this case.

IV. *DAVIS* SHOULD NOT BE OVERRULED.

In a footnote, the Tax Department states that to the extent the *Davis* test renders § 11-21-12(0(6) unconstitutional, the Tax Department wishes to preserve its argument that *Davis* should be overruled. According to the Tax Department, prohibiting a state from providing favorable tax treatment to a small group of state employees is contrary to the intent of the intergovernmental tax immunity doctrine and goes too far in hamstringing the taxing powers of the states. The Tax Department's focus on the size of the

group is misplaced. The intent of the modern constitutional doctrine of intergovernmental tax immunity is to prevent tax discrimination against federal employees based on the source of their compensation. *See Davis*, 489 U.S. at 810–17. The Tax Department has cited no United States Supreme Court case holding that the doctrine is not violated where only a small group of federal employees are discriminated against based on the source of their compensation.[15]

* * *

[15] Indeed, the size of a group has no bearing on whether favoring or disfavoring that group for an impermissible reason is discrimination. State and local law enforcement officers may make up only a

* * *

No. 17-419

IN THE

Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER,
State Tax Commissioner of West Virginia,

Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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QUESTION PRESENTED

Whether the doctrine of intergovernmental tax immunity, as codified by 4 U.S.C. § 111, prohibits the State of West Virginia from exempting from state taxation the retirement benefits of retired state law enforcement officers without providing the same exemption for retired employees of the U.S. Marshals Service.

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INTRODUCTION

The State of West Virginia provides a complete tax exemption for *state* law enforcement retirees' income from certain state retirement plans. But it denies that favorable tax treatment to *federal* law enforcement retirees like Petitioner James Dawson, a retired U.S. Marshal.

In *Davis v. Michigan Department of Treasury*, this Court held that such discriminatory tax treatment violates the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111, which codifies the doctrine. 489 U.S. 803 (1989). Under *Davis*, "[t]he imposition of a heavier tax burden on [federal retirees] than is imposed on [state retirees] must be justified by significant differences between the two classes." *Id.* at 815-16 (quoting *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)).

In this case, there is no doubt that West Virginia imposes a "heavier tax burden" on federal law enforcement retirees like Dawson than on the favored state retirees. And "[i]t is undisputed ... that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers" who receive the exemption. Pet.App.22a.

Nonetheless, the West Virginia Supreme Court of Appeals upheld the discriminatory tax scheme without identifying any "significant difference" between federal law enforcement retirees like Dawson and the state retirees. It did so by purportedly distinguishing *Davis* on the ground that the law at issue there "afforded a blanket exemption to *all* state retirees," whereas the law challenged here "exempts a

narrow class of state employees." Pet.App.10a (quoting *Brown v. Mierke*, 443 S.E.2d 462, 466 (W.Va. 1994)). But nothing in *Davis* supports the notion that § 111 allows a state to discriminate in favor of *some* of its retirees so long as it does not discriminate in favor of *all* of them.

The court below went on to apply a test of its own devising that bears no resemblance to the bright-line rule laid out by *Davis*. Under the state court's test, "[c]hallenges to a state tax scheme under 4 U.S.C. § 111 can succeed only when one *purpose* of the challenged scheme is shown to discriminate against the officer or employee because of the source of pay." Pet.App.11a (quoting *Brown*, 443 S.E.2d at 463) (emphasis altered). And the "intent of the scheme" is ascertained from "the totality of the circumstances." *Id.* (quoting *Brown*, 443 S.E.2d at 463).

According to the court below, three such "circumstances" demonstrate the absence of discriminatory intent in this case. First, federal retirees are treated slightly better than *private-sector* retirees—a comparison that *Davis* expressly held to be irrelevant, 489 U.S. at 815 n.4. Second, federal law enforcement retirees are treated the same as state retirees who did *not* work in law enforcement—another reference to the lower court's erroneous distinction between "blanket" and "narrow" discrimination. Finally, "an unknown number of ... deputy sheriffs" receive their pensions from the general state employee pension plan rather than the law enforcement plans that benefit from the full exemption, meaning that those retired deputies are also treated the same as federal retirees. Pet.App.13a. For these reasons, the court concluded that the

exemption "gives a benefit to a very narrow class of former state and local employees, and that benefit was not intended to discriminate against former federal marshals." Pet.App.16a.

But those considerations are all irrelevant under *Davis*, which held that the intent behind a discriminatory tax scheme is "wholly beside the point, ... for it does nothing to demonstrate that there are 'significant differences between the two classes.'" 489 U.S. at 816 (quoting *Phillips Chemical*, 361 U.S. at 383). And under the straightforward two-part test of *Davis*, the exemption at issue here violates § 111. First, it undoubtedly imposes a heavier tax burden on federal law enforcement retirees than on state law enforcement retirees. Second, no "significant differences between the two classes" justify the discrimination—indeed, the state court did not even purport to identify such a difference. Under *Davis*, the analysis ends there.

This Court should reverse.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (Pet.App.1a) is unreported, but it is available at 2017 WL 2172006. The opinion of the Circuit Court of Mercer County (Pet.App.17a) is unreported.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered judgment on May 17, 2017. On August 9, 2017, the Chief Justice extended the time to file a petition for a writ of certiorari until September 9, 2017. On August 29, 2017, the Chief Justice further extended the time to file until September 19, 2017. The petition

was filed on that date. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

4 U.S.C. § 111(a) provides:

> **(a) General rule.**—The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

W. Va. Code § 11-21-12(c)(6) provides:

> (c) *Modifications reducing federal adjusted gross income.*—There shall be subtracted from federal adjusted gross income to the extent included therein:
>
> * * *
>
> (6) Retirement income received in the form of pensions and annuities after December 31, 1979, under any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System, including any survivorship annuities derived from any of these programs, to the extent includable in gross income for federal income tax purposes.

STATEMENT

The doctrine of intergovernmental tax immunity dates back to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.). In *McCulloch*, this Court struck down a discriminatory Maryland law that taxed the federally chartered Bank of the United States while exempting "all Banks ... chartered by the [Maryland] Legislature." *Id.* at 320.

The tax immunity doctrine "has been generally codified at 4 U.S.C. § 111." *Reich v. Collins*, 513 U.S. 106, 108 (1994). That statute says that a state tax on the pay of a federal employee must not "discriminate against the ... employee because of the source of the pay." 4 U.S.C. § 111(a).

In *Davis*, this Court held that § 111 applies to federal retirement benefits as well as to current employees' pay. 489 U.S. at 808-10.

A. Factual Background

Petitioner James Dawson is a retired federal law enforcement officer. Pet.App.4a, 18a. He served for most of his career as a deputy U.S. Marshal and was ultimately appointed U.S. Marshal for the Southern District of West Virginia. Pet.App.4a. Dawson retired from the U.S. Marshals Service in 2008. *Id.* As a result of his federal service, he receives retirement income from the Federal Employees Retirement System. *Id.*

The State taxes Dawson's retirement income and the income of other federal retirees. Pet.App.2a. By contrast, it provides a complete tax exemption for the income that retired *state* law enforcement officers receive from specified state retirement plans. Pet.App.3a; *see* W. Va. Code § 11-21-12(c)(6)

(exempting "[r]etirement income ... under any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System").

Because federal law prohibits the State from discriminating based on the federal source of retirement income, Dawson and his wife claimed an exemption under § 12(c)(6). Pet.App.4a. The State Tax Commissioner denied their claim, and the West Virginia Office of Tax Appeals affirmed. Pet.App.4a-5a.

The Dawsons sought judicial review.

B. Proceedings Below

1. The Circuit Court of Mercer County reversed. Pet.App.17a-25a. Applying this Court's decision in *Davis*, it held that the State had violated § 111 and the tax immunity doctrine by taxing federal law enforcement retirees more heavily than state law enforcement retirees. Pet.App.24a.

The circuit court summarized the rule of *Davis* as follows:

> [W]hen a state tax statute is alleged to violate the constitutional doctrine of intergovernmental tax immunity by favoring state employees over similarly situated federal employees, the proper inquiry is whether the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes.

Pet.App.22a. In this case, the circuit court concluded, no "significant differences" between Dawson and the

exempted state retirees justified the inconsistent tax treatment. Pet.App.22a-24a.

First, the circuit court recognized that "[i]t is undisputed in the present matter that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers listed in" § 12(c)(6). Pet.App.22a.

Second, the circuit court held that the State's proffered justification for the discriminatory tax treatment—"that the Legislature crafted [§ 12(c)(6)] specifically to benefit the narrow class of *state* law enforcement officers"—actually undercuts the State's case under *Davis*. Pet.App.23a. "This type of inconsistent tax treatment is ... unquestionably based on the source of one's retirement income and precisely the type of favoritism the doctrine of intergovernmental tax immunity prohibits." *Id.*

Third, the circuit court held that although federal retirees on average receive larger pensions than state retirees, that difference could not justify offering a full exemption to state retirees only. Pet.App.23a-24a. The circuit court emphasized that this Court "rejected this very notion in *Davis*," because "[a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits" but "on the basis of the amount of benefits received by individual retirees." Pet.App.24a (quoting *Davis*, 489 U.S. at 817). "Had the ... Legislature intended [§ 12(c)(6)] to account for differences in income instead of differences in the source of income, it easily could have do[ne] so." *Id.*

For these reasons, the circuit court concluded that the State's tax scheme "violates 4 U.S.C. § 111 and the constitutional doctrine of intergovernmental tax immunity by favoring retired state and local law enforcement officers over retired federal law enforcement officers." Pet.App.24a.

2. Declaring that it could "find[] no substantial question of law," the West Virginia Supreme Court of Appeals reversed. Pet.App.2a.

The court began by acknowledging what *Davis* held:

> [I]f a heavier tax burden is imposed upon a class of individuals who deal with the federal government than is imposed upon those individuals who deal with state government, then "the relevant inquiry is whether the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.'"

Pet.App.8a (quoting *Davis*, 489 U.S. at 815-16). The court expressed no doubt that § 12(c)(6) imposes "inconsistent tax treatment." Pet.App.12a. And it identified no "significant differences" between the state and federal retirees that might justify that inconsistent treatment. Br. in Opp. 20 (conceding as much). Yet it nonetheless upheld the discriminatory tax scheme.

Rather than follow *Davis*, the court below adhered to its earlier decision in *Brown v. Mierke*, 443 S.E.2d 462 (W.Va. 1994), which rejected a challenge to § 12(c)(6) brought by federal *military* retirees. Pet.App.9a-10a. *Brown* distinguished *Davis* on the ground that it addressed a "blanket exemption" available "to *all* state retirees," whereas § 12(c)(6)

"exempts a *narrow* class of state employees from state taxation while taxing federal employees." Pet.App.10a (quoting *Brown*, 443 S.E.2d at 466). *Brown* further reasoned that § 12(c)(6) "differed from the 'schemes invalidated by the Supreme Court in that there is no intent in the West Virginia scheme to discriminate *against* federal retirees; rather, the intent is to give a benefit to a very narrow class of former state and local employees.'" Pet.App.10a (quoting *Brown*, 443 S.E.2d at 466).

In contrast to this Court's holding in *Davis*, *Brown* stated the law as follows:

> Challenges to a state tax scheme under 4 U.S.C. § 111 can succeed only when one purpose of the challenged scheme is shown to discriminate against the officer or employee because of the *source* of pay or compensation. In determining whether such discrimination exists, a court will look to the totality of the circumstances to ascertain whether the intent of the scheme is to discriminate against employees or former employees of the federal government.

Pet.App.11a (quoting *Brown*, 443 S.E.2d at 463).

Applying this standard, the court below held that the Dawsons had failed to establish discriminatory intent in light of the following circumstances. Pet.App.15a.

First, the State gives slightly better tax treatment (a $2000 exemption) to federal retirees than it gives to *private-sector* retirees and retired state judges. Pet.App.15a & n.11.

Second, although the State discriminates in favor of the law enforcement retirees covered by § 12(c)(6), it

treats federal retirees like Dawson the same as most *other* state retirees (who also receive only the $2000 exemption). Pet.App.15a.

Finally, not all state "law enforcement officers ... are permitted to rely upon the Section 12(c)(6) exemption." Pet.App.15a-16a. That is because "[a]n unknown number of ... deputy sheriffs" receive their pensions from the general state employees' retirement fund and may take only the $2000 exemption. Pet.App.13a.

The court below concluded that "Section 12(c)(6) gives a benefit to a very narrow class of former state and local employees, and that benefit was not intended to discriminate against former federal marshals." Pet.App.16a. Following the intent-based standard it created in *Brown*, the court rejected the Dawsons' claim. *Id.*

SUMMARY OF ARGUMENT

Section 111, which codifies the doctrine of intergovernmental tax immunity, says that a state tax on the pay of a federal employee must not "discriminate against the ... employee because of the source of the pay." 4 U.S.C. § 111(a). In *Davis*, this Court struck down a discriminatory Michigan tax scheme and established a bright-line rule for deciding whether a state's taxation of federal retirees violates § 111. Under that two-step analysis, a state violates § 111 if (1) it imposes "a heavier tax burden" on income from the federal government than on income from the state and (2) the inconsistent treatment is not "'justified by significant differences between the two classes.'" *Davis*, 489 U.S. at 815-16 (quoting *Phillips Chemical*, 361 U.S. at 383).

West Virginia's tax scheme is invalid under the *Davis* framework. At step one, the State plainly imposes a heavier tax burden on federal law enforcement retirees than on its own law enforcement retirees. At step two, the court below did not even attempt to point to any significant difference between federal and state law enforcement retirees that could justify the inconsistent tax treatment. Nor could it. It is undisputed that Dawson's job responsibilities were not significantly different from those of the favored state retirees. And although the State argued below that its discrimination is justified by the more generous benefits that federal retirees typically receive, *Davis* expressly rejected that very argument, holding that such differences could justify discrimination "on the basis of the amount of benefits received by individual retirees" but not "on the basis of the source of those benefits." 489 U.S. at 817.

The state court's contrary decision was wrong. First, the state court declined to apply the clear framework this Court adopted in *Davis*, asserting that the framework applies only to tax schemes that exempt *all* state retirees. But the rule set forth in *Davis* is categorical and, under that rule, § 12(c)(6) is plainly invalid. Next, with *Davis* out of the way, the state court declared that the relevant question is whether § 12(c)(6) was intended to benefit state employees or burden federal employees. But *Davis* forecloses that inquiry as well; a state's *interest* in discriminatory treatment, no matter how rational, is irrelevant to whether it has engaged in impermissible discrimination. Finally, the court below analyzed how federal retirees' tax treatment compared to that of *private-sector* retirees, and it relied on that

comparison to support its finding that § 12(c)(6) is nondiscriminatory. Once again, that reasoning contravenes *Davis*, which held that the proper comparison is between federal and state *public-sector* retirees, not private-sector retirees.

Because the State here taxes federal retirees more heavily than state retirees, and because no significant differences between the classes justify the inconsistent tax treatment, the State's tax scheme violates § 111.

This Court should reverse.

ARGUMENT

I. SECTION 111 PROHIBITS A STATE FROM TAXING FEDERAL RETIREES MORE THAN STATE RETIREES UNLESS "SIGNIFICANT DIFFERENCES" JUSTIFY THE INCONSISTENT TREATMENT.

Under § 111, a state tax on the pay of a federal employee must not "discriminate against the ... employee because of the source of the pay." 4 U.S.C. § 111(a). This clause of § 111 "is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." *Davis*, 489 U.S. at 813.

In a trilogy of cases beginning with *Davis*, this Court established that a state violates § 111 if (1) it imposes "a heavier tax burden" on income from the federal government than on income from the state and (2) the discrimination is not "justified by significant differences between the two classes." *Davis*, 489 U.S. at 815-16 (quoting *Phillips Chemical*, 361 U.S. at 383). In short, "the relevant inquiry is whether the inconsistent tax treatment is directly related to, and

justified by, 'significant differences between the two classes.'" *Id.* at 816 (quoting *Phillips Chemical*, 361 U.S. at 383).

1. *Davis* addressed a challenge to a Michigan law that "exempt[ed] from taxation all retirement benefits paid by the State or its political subdivisions, but levie[d] an income tax on retirement benefits paid by all other employers, including the Federal Government." *Id.* at 805. The plaintiff was a federal retiree who sued for the same exemption that state retirees received. *Id.* at 805-07.

At the first step of the analysis, the Court found it "undisputed" that Michigan imposed a heavier tax burden on federal retirees than on state retirees. *Id.* at 814. The Court acknowledged that federal retirees were treated no worse than *private-sector* retirees, but held that comparison irrelevant to the analysis. *Id.* at 815 n.4. Instead, the proper comparison was between federal and state public-sector retirees, because "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it." *Id.* And Michigan's tax system plainly "discriminate[d] in favor of retired state employees and against retired federal employees." *Id.* at 814.

At the second step, Michigan argued that there were significant differences between federal and state retirees because it had a "rational reason" for its "preferential treatment" of state retirees: to advance its own "interest in hiring and retaining qualified civil servants through the inducement of a tax exemption for retirement benefits." *Id.* at 816. But the Court

held that the *intent* behind Michigan's tax scheme was "wholly beside the point," because it "d[id] nothing to demonstrate that there are significant differences between the two classes." *Id.* "The State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment." *Id.*

Asserting that "its retirement benefits [we]re significantly less munificent than those offered by the Federal Government," Michigan also pointed to the "substantial difference in the value of the retirement benefits paid" to state versus federal retirees. *Id.* But the Court rejected the notion that "this difference suffices to justify the type of blanket exemption" that Michigan offered, which covered state retirees and excluded federal retirees without regard to the amount of benefits that a given retiree received. *Id.* at 817. "A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the *source* of those benefits ...; rather, it would discriminate on the basis of the *amount* of benefits received by individual retirees." *Id.* (emphases added).

In short, neither the state's intention to benefit its own retirees (rather than to harm federal retirees) nor differences in the value of state and federal retirement benefits could justify a tax exemption available only to state retirees. The Court thus concluded that Michigan's tax scheme "violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees." *Id.*

Justice Stevens alone dissented. He would have treated § 111 not as a ban on discriminatory tax treatment of federal versus state employees, but as a narrow protection against a problem of political process: Because "the Federal Government has no voice in the policy decisions made by the several States," a tax imposed only on federal employees "could be escalated by a State so as to destroy the federal function performed by them." *Id.* at 819 & 820 n.2 (Stevens, J., dissenting). But as long as a tax affects a "significant group of state citizens," § 111 does not preclude a state from favoring its own employees. *Id.* at 820 n.2, 824. Since the state retirees favored by Michigan's tax scheme amounted to only "a small percentage of its residents," and the scheme drew "no distinction between the federal employees or retirees and the vast majority of voters in the State" (that is, private-sector workers), Justice Stevens would have upheld it. *Id.* at 821, 823.

Justice Stevens acknowledged the broad impact of the Court's contrary holding: "[A]t least 14 other States grant special tax exemptions for retirement income to state and local government employees that they do not grant to federal employees," making those exemptions invalid unless justified by significant differences between the two classes. *Id.* at 822. He specifically identified West Virginia's § 12(c)(6) as one of the exemptions presumptively invalidated by the Court's ruling. *Id.* at 822 n.3.

The majority squarely rejected Justice Stevens' approach. It declined to engage in a free-form totality-of-the-circumstances analysis to decide whether the number of voters subject to the same tax treatment as federal retirees was large enough to prevent excessive

taxation of federal benefits. *See id.* at 815 n.4. In the majority's view, it was insufficient for the state to treat federal retirees as well as private-sector retirees. *Id.* Rather, the majority hewed to its bright-line rule: "'[I]t does not seem too much to require that the State treat those who deal with the [Federal] Government as well as it treats those with whom it deals itself.'" *Id.* (quoting *Phillips Chemical*, 361 U.S. at 385).

2. The Court again applied the *Davis* test in *Barker v. Kansas*, 503 U.S. 594 (1992). Kansas "taxe[d] the benefits received from the United States by military retirees but d[id] not tax the benefits received by retired state and local government employees." *Id.* at 596. The question was whether the state tax scheme was "inconsistent with 4 U.S.C. § 111." *Id.*

Barker began by outlining the *Davis* framework: Courts should "evaluate a state tax that is alleged to discriminate against federal employees in favor of state employees by inquiring 'whether the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes.'" *Id.* at 598 (quoting *Davis*, 489 U.S. at 816).

At the first step of the analysis, there was no dispute that military retirees were treated worse than state retirees. Kansas law extended a benefit to the latter that it withheld from the former. *Id.* at 596 n.1.

At the second step, Kansas could point to no "significant differences" between military and state retirees that justified the inconsistent tax treatment. Kansas argued that whereas state retirement benefits are deferred compensation for prior employment, military retirement benefits are best viewed as pay for current employment (because "[f]ederal military

retirees remain members of the armed forces ... after they retire from active duty"). *Id.* at 598. But the Court rejected the state's premise: "For purposes of 4 U.S.C. § 111, military retirement benefits are to be considered deferred pay for past services. In this respect they are not significantly different from the benefits paid to Kansas state and local government retirees." *Id.* at 605. Because no significant difference justified the inconsistent tax treatment, it violated § 111. *Id.*

Notably, the Court paid no attention to the fact that the Kansas exemption applied to most federal civilian retirees, *see id.* at 596 n.1, which might have been taken to indicate that Kansas bore no animus against the federal government. Nor did the Court suggest that the Kansas scheme reflected an *intent* to discriminate against the military. To the contrary (and consistent with *Davis*), the Court expressed no interest in the intent behind the discrimination.

Agreeing that "this case is controlled by *Davis*," Justice Stevens joined the unanimous opinion of the Court. *Id.* at 605 (Stevens, J., joined by Thomas, J., concurring). While accepting *Davis* as precedent, Justice Stevens reiterated his disagreement with it, asserting that "federal judges should not be able to claim a tax exemption simply because a State decides to give such a benefit to the members of its judiciary." *Id.* at 606. He concluded by noting that *Davis* was "subject to review and correction by Congress." *Id.*

Congress, however, has taken no action to "correct[]" *Davis*. Six years after *Barker* was decided, Congress amended § 111, adding two new subsections (which are not relevant here) and adding the title "General

Rule" to what is now § 111(a). *See* Pub. L. No. 105-261, 112 Stat. 2138-2139 (Oct. 17, 1998). The amendments made no change to § 111's nondiscrimination mandate.

3. The Court applied the *Davis* framework once more in *Jefferson County v. Acker*, 527 U.S. 423 (1999). In that case, federal district judges brought a § 111 challenge to an Alabama county's tax on the income of "persons working within the county who are not otherwise required to pay a license fee under state law." *Id.* at 427.

The Court rejected the challenge. "[B]y contrast" to the tax in *Davis*, Jefferson County did not tax federal and state employees differently; rather, "all State District and Circuit Court judges in Jefferson County and the three State Supreme Court justices who have satellite offices in the county" were subject to the same tax as federal judges. *Id.* at 443. Moreover, the "record show[ed] no discrimination ... between similarly situated federal and state employees" in the county's practice of granting exemptions, and the Court saw "no sound reason to deny Alabama counties the right to tax with an even hand the compensation of federal, state, and local officeholders." *Id.*

The Court warned, however, that "[s]hould Alabama or Jefferson County authorities take to exempting state officials while leaving federal officials (or a subcategory of them) subject to the tax, that would indeed present a starkly different case." *Id.*

* * *

In sum, in assessing compliance with § 111, this Court has repeatedly affirmed and applied the bright-line rule set forth in *Davis*. And it has clearly rejected the totality-of-the-circumstances approach suggested

in Justice Stevens' *Davis* dissent; the Court does not count up whether "enough" voters are treated the same as the federal retirees to ensure against excessive taxation of the federal retirees. The Court simply asks:

> (1) Does the state subject federal retirees to tax treatment that is less favorable than the tax treatment of state retirees?
>
> (2) If so, is the inconsistent tax treatment justified by significant differences between the two classes?

This test ascertains whether a heavier tax on federal retirees is based on the federal source of their income or some other, nondiscriminatory basis. If a state tax scheme fails the test, then it discriminates against the federal employees because of the source of their pay and thus violates § 111.

II. WEST VIRGINIA TAXES FEDERAL LAW ENFORCEMENT RETIREES MORE THAN STATE LAW ENFORCEMENT RETIREES, DESPITE THE ABSENCE OF SIGNIFICANT DIFFERENCES.

Under a straightforward application of the two-step *Davis* test, the State's tax scheme violates § 111.

First, Dawson and other federal law enforcement retirees are taxed more heavily than state law enforcement retirees. Under § 12(c)(6), the State exempts from income tax *all* retirement benefits of the vast majority of state law enforcement retirees. W. Va. Code § 11-21-12(c)(6). By contrast, it exempts only "the first $2,000 of benefits received under any federal retirement system." *Id.* § 11-21-12(c)(5). Plainly, the State does not "treat those who deal with the [Federal]

Government as well as it treats those with whom it deals itself." *Davis*, 489 U.S. at 815 n.4.

Second, no "significant differences" between federal law enforcement retirees like Dawson and the state retirees who receive a full exemption justify this inconsistent tax treatment. "It is undisputed ... that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers." Pet.App.22a; *see also* Br. in Opp. i (question presented is whether the State must extend exemption to "federal retirees with job descriptions similar" to favored state retirees). And the court below identified no other significant differences. Br. in Opp. 20 (conceding as much).

Nor are there any other significant differences that might justify the inconsistent tax treatment. The state circuit court properly rejected West Virginia's argument that "the income differential between state and local law enforcement officers and their federal counterparts" could justify the discrimination. Pet.App.23a-24a. After all, *Davis* rejected that very argument in analogous circumstances: "A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as [the State's] statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees." 489 U.S. at 817. Here, as in *Davis*, eligibility for a full exemption depends not on the amount of benefits received, but solely on whether the retiree receives the benefits from the favored state plans or from the federal government. W. Va. Code § 11-21-12(c)(5), (c)(6).

III. THE DECISION BELOW CONTRAVENES *DAVIS*.

The court below upheld the State's discriminatory tax scheme on grounds that this Court expressly rejected in *Davis*. First, the state court followed its own precedent in *Brown*, which held that *Davis* applies only when a state offers favorable tax treatment to *all* state retirees—effectively limiting *Davis* to its facts. Second, it held that the dispositive question under § 111 is whether a state intends to discriminate *against* federal retirees or rather to extend a *benefit* to state retirees. But *Davis* squarely held that a state's "interest" in discriminating—even an apparently benign interest like benefiting its own retirees—is "simply irrelevant" under § 111. 489 U.S. at 816. Finally, the state court relied on the fact that the State treats federal retirees better than *private-sector* retirees. Yet *Davis* rejected precisely that argument, making clear that a state's tax treatment of private-sector retirees plays no role in the § 111 analysis. 489 U.S. at 815 n.4.

A. *Davis* Does Not Turn On Whether A State Discriminates In Favor Of All Of Its Employees Or Only Some Of Them.

In upholding the State's inconsistent tax treatment, the court below followed its own decision in *Brown* rather than this Court's decision in *Davis*. In *Brown*, the court below acknowledged that *Davis* "would appear to call into question" § 12(c)(6)'s discriminatory exemption. 443 S.E.2d at 466. But it reasoned that *Davis* was not "controlling" because it involved a "blanket" tax exemption—which the state court understood to mean that the exemption was available

to *all* state retirees. *Id.* at 465. Because § 12(c)(6) instead offers an exemption only to *some* state retirees, the court below refused to apply *Davis*. *Id.* at 465, 467. The court below misunderstood both this Court's use of the term "blanket exemption" and the irrelevance under *Davis* of how many state retirees the state chooses to give preferential treatment.

1. *Davis* used the term "blanket exemption" only once, in the course of rejecting Michigan's argument that the difference in average income between federal and state retirees justified its discriminatory tax scheme. 489 U.S. at 817. The Court said:

> Even assuming the State's estimate of the relative value of state and federal retirement benefits is generally correct, we do not believe this difference suffices to justify the type of blanket exemption at issue in this case. While the average retired federal civil servant receives a larger pension than his state counterpart, there are undoubtedly many individual instances in which the opposite holds true. A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees.

Id.

In context, the Court used the phrase "blanket exemption" to describe an exemption that applied to state retirees and excluded federal retirees *without regard to income*. That is, the exemption applied to state retirees (and not to federal retirees) at *all* income

levels, even though there were "undoubtedly many individual instances" of federal retirees with lower income than state retirees. *Id.* Because it was a "blanket" exemption in the sense of disregarding differences in income, it could not be justified by reference to such differences.

In contrast, it was irrelevant to the Court's analysis whether the class of individuals who received the exemption consisted of all state retirees or just a subset of them—such as, for example, state law enforcement retirees. In either case, the exemption would be available to state retirees (and not federal retirees) regardless of an individual retiree's income level. And so in either case, the outcome would be the same: Differences in *amount* of income could not justify a tax scheme that discriminates based on the *source* of the income. *Id.*

There is thus no reason to understand "blanket exemption" to refer to the inconsequential fact that the exemption applied to "all" state retirees. Rather, in context, a "blanket exemption" is one that is available to its beneficiaries regardless of income level. Indeed, even the exemption in *Davis* was not a "blanket exemption" in the sense of applying to everyone "with whom [the state] deals itself," *id.* at 815 n.4—it did not apply to everyone who received income from the state, but only to *retired* state employees.

As this Court used the term, this case involves a "blanket" exemption just as much as *Davis* did: The benefits of all state retirees enrolled in the specified pension plans are exempt from taxation regardless of income level. *Davis* cannot be distinguished on this basis.

2. To the extent that the state court's decision was premised not on *Davis*'s use of the phrase "blanket exemption," but on the mere happenstance that the particular tax scheme under review there applied to all state retirees, the court again misconstrued *Davis*. Nothing in *Davis* turned on that detail.

As for the two-step framework the Court adopted, neither the majority nor the dissent ever suggested any limit to its applicability. The Court's holding was categorical: "Under our precedents, 'the imposition of a heavier tax burden on [federal retirees] than is imposed on [state retirees] must be justified by significant differences between the two classes.'" *Id.* at 815-16 (quoting *Phillips Chemical*, 361 U.S. at 383). In other words, *Davis* established the analytical framework for *all* § 111 litigation. *See id.*

Like that analytical framework, the result in *Davis* was also untethered to the fact that the exemption there applied to all state retirees rather than just some of them. At the first step of the analysis, the Court found that the federal retirees were treated worse than state retirees because everyone in the latter group received an exemption that was unavailable to the former. *Id.* at 814. But nothing in *Davis* suggests that the outcome would have been different if only *some* state retirees could claim the exemption. Rather, as long as *any* state retirees were treated better than federal retirees, the differential treatment might have been based on source of income, and thus the analysis would have to proceed to consider whether "significant differences" demonstrated that the distinction was based on some other factor.

At the second step of its analysis, the *Davis* Court found that no significant differences justified Michigan's tax scheme. As discussed above, the Court dismissed Michigan's argument that the difference in average income between state and federal employees justified the unequal tax treatment. 489 U.S. at 816. And there is no basis to conclude that the Court would have reached a different conclusion if Michigan had offered an exemption only to a subset of state retirees. *Id.*

Indeed, Justice Stevens specifically objected to this aspect of *Davis*. In dissent, he wrote: "The obligation of a federal judge to pay the same tax that is imposed on the income of similarly situated citizens in the State should not be affected by the fact that the State might choose to grant an exemption to a few of its taxpayers—whether they be state judges, other state employees, or perhaps a select group of private citizens." *Davis*, 489 U.S. at 821-22 (Stevens, J., dissenting). And he reiterated that point in *Barker*: "federal judges should not be able to claim a tax exemption simply because a State decides to give such a benefit to the members of its judiciary." 503 U.S. at 606 (Stevens, J., concurring). In other words, Justice Stevens recognized that the Court would find a violation of § 111 when even a *subset* of state employees was treated better than federal employees in the absence of significant differences. The Court rejected Justice Stevens' view, but it never questioned his understanding of its rulings.

Similarly, the Court in *Jefferson County* concluded that, while the challenged tax scheme was lawful because "[t]he record show[ed] no discrimination ... between similarly situated federal and state

employees," if the county were to "exempt[] state officials while leaving federal officials (or a subcategory of them) subject to the tax, that would indeed present a starkly different case." 527 U.S. at 443. The Court's statement makes clear that the county would violate § 111 by exempting just some of its employees while denying the same exemption to "similarly situated" federal workers. Section 12(c)(6) does precisely that.

3. Limiting *Davis* to only those tax policies that discriminate in favor of *all* state retirees would also lead to absurd results. On that logic, Michigan could have cured the violation in *Davis* simply by taking its favorable tax treatment away from one unlucky state retiree, while continuing to treat every other state retiree better than all federal retirees. Or Michigan could have denied the exemption to just a defined subset of state retirees (perhaps, as here, participants in particular state pension plans). Extending preferential treatment to the other state retirees but none of the federal retirees would obviously discriminate based on source of income—just as a law exempting tall men while taxing both women and short men would discriminate based on sex. Yet, on the state court's reasoning, these hypothetical tax schemes would survive review. Alternatively, Michigan could have circumvented *Davis* by creating narrow exemptions for many groups of state retirees (one for police, one for firemen, one for teachers, and so on) that would add up to something very similar to an exemption for all state retirees. That is obviously wrong, and *Davis* appropriately prevents such unfair and arbitrary results. The state court's analysis invites them.

B. The Intent Behind A Discriminatory Tax Scheme Is Irrelevant.

Instead of applying *Davis*, the court below applied the flawed framework it created in *Brown*: "[I]n determining whether [§ 111] discrimination exists, this Court 'will look to the totality of the circumstances to ascertain whether the *intent* of the scheme is to discriminate against employees or former employees of the federal government.'" Pet.App.14a-15a (quoting *Brown*, 443 S.E.2d at 463). Using that framework, the court below upheld the tax scheme as nondiscriminatory, because the "intent" of the scheme was "to give[] a *benefit* to a very narrow class of state retirees," not to "discriminate *against* former federal marshals." Pet.App.16a (emphases added). *Davis*, however, specifically rejected this sort of reasoning.

Davis held that a state's reason for imposing a discriminatory tax is "wholly beside the point." 489 U.S. at 816. Michigan had claimed a motive that was nearly identical to the one the state court attributed to West Virginia here. According to Michigan, it exempted state retirement benefits so that it could "hir[e] and retain[] qualified civil servants through the inducement of a tax exemption for retirement benefits." *Id.* In other words, it wanted to offer a *benefit* to state employees in order to attract higher quality workers. It had no animus toward federal retirees, and no intent to burden, or discriminate *against*, them. But this Court was unequivocal: "The State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant." *Davis*, 489 U.S. at 816.

The state court's contrary holding would render § 111 a dead letter. If a state could avoid "discrimination" simply by aiming to *benefit* some favored group of taxpayers (or itself), it could get around the statute through mere wordplay. Every discriminatory tax scheme creates winners and losers, and thus a state can *always* cast its tax as motivated by an intent to *benefit* the winners rather than discriminate *against* the losers. Perhaps that is why the state court never explained just what *would*, in its view, constitute an impermissible "intent ... to discriminate." Pet.App.11a (quoting *Brown*, 443 S.E.2d at 463).

Of course, states are free to offer financial inducements to attract and retain qualified employees. Nothing prevents a state from simply raising its employees' pay or retirement benefits to whatever level it deems best. But "to provide the same after-tax benefits to all retired state employees by means of increased salaries or benefit payments instead of a tax exemption, the State would have to increase its outlays by more than the cost of the current tax exemption, since the increased payments to retirees would result in higher federal income tax payments in some circumstances." *Davis*, 489 U.S. at 815 n.4. That is why states might seek to compensate their employees through discriminatory tax exemptions rather than by simply paying them more. It is also one reason why § 111 prohibits them from doing so: "Taxes enacted to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to bar." *Id.*

C. A State's Treatment Of Private-Sector Retirees Is Irrelevant.

The court below relied on the fact that federal retirees "receive[] more favorable treatment" than *private-sector* retirees. Pet.App.15a (referring to a $2000 exemption for public employees' retirement benefits). But *Davis* makes clear that a state's treatment of private-sector retirees is irrelevant to the § 111 analysis, which simply asks whether "the imposition of a heavier tax burden on those who deal with one sovereign than is imposed on those who deal with the other" is "justified by significant differences between the two classes." 489 U.S. at 815-16 (quoting *Phillips Chemical*, 361 U.S. at 383). Private-sector retirees, who "deal with" *neither* sovereign, have no role to play in this framework. *Id.* at 815 n.4.

Indeed, the state court's reasoning mirrors Justice Stevens' argument in his *Davis* dissent that the Michigan tax scheme was nondiscriminatory because it "dr[ew] no distinction between the federal employees or retirees and the vast majority of voters in the State." 489 U.S. at 823 (Stevens, J., dissenting). Justice Stevens considered Michigan's tax scheme unobjectionable because it "applie[d] to approximately 4½ million individual taxpayers in the State, including the 24,000 retired federal employees," and "exempt[ed] only the 130,000 retired state employees." *Id.* at 821. He thus faulted the Court for focusing exclusively on "whether the tax treatment of federal employees is equal to that of one discrete group of Michigan residents—retired state employees." *Id.* Because the large population of private-sector retirees subject to taxation was an adequate "political check" against

excessive taxation of federal benefits, Justice Stevens found no problem under § 111.

The majority expressly rejected this logic. *Id.* at 815 n.4. It observed that *Phillips Chemical* had invalidated a scheme that taxed lessees of federal property more heavily than lessees of state property, even though there was "no discrimination between the [Federal] Government's lessees and lessees of private property." *Id.* (quoting *Phillips Chemical*, 361 U.S. at 381). And that reasoning was "consistent with the underlying rationale for the doctrine of intergovernmental tax immunity," because "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it." *Id.* The *Davis* majority drew a bright line: "[I]t does not seem too much to require that the State treat those who deal with the [Federal] Government as well as it treats those with whom it deals itself." *Id.* (quoting *Phillips Chemical*, 361 U.S. at 385).

Because it offers a "unique tax exemption," Pet.App.3a, solely to law enforcement retirees "with whom it deals itself" and not to federal law enforcement retirees, *Davis*, 489 U.S. at 815 n.4, the State's tax scheme contravenes *Davis*. The court below was wrong to conclude otherwise.

D. Unlike This Court's Bright-Line Rule, The State Court's Totality-Of-The-Circumstances Analysis Is Unworkable.

As discussed above, *Davis* establishes a straightforward two-part test. By contrast, according

to the court below, a state violates § 111 only if its "intent" is to discriminate against federal retirees (rather than in favor of state retirees), and courts must discern the state's intent from the "totality of the circumstances." Pet.App.11a.

The state court's framework is unworkable. In determining that § 12(c)(6) was nondiscriminatory, the court found it relevant that Dawson received "more favorable tax treatment than state civilian retirees" and "retired state justices and circuit judges." Pet.App.15a. It also relied on the fact that Dawson received the same tax treatment as the "vast majority" of state retirees. *Id.* But it provided no guidance as to the proper outcome under slightly different facts. What would be the result, for example, if 80% of state retirees were treated like Dawson? Or 70%? Are such majorities sufficiently "vast" to suggest compliance with § 111? What if only a bare majority of state retirees received the same tax treatment as Dawson? And what if private and judicial retirees were merely treated the same as Dawson rather than worse than him? Would the answer change if a minority of private-sector retirees were treated better? What if only a small subset of federal retirees were subject to the heaviest tax burden? Or if all federal retirees were targeted for unfavorable tax treatment, but the legislature's undisputed and documented intent was to generate tax revenue to *benefit* state retirees? The state court's test would raise each of these unanswerable questions, whereas the bright-line rule this Court drew in *Davis* avoids them.

Under an amorphous test like the one applied below, states could not predict whether their tax schemes were legal, and the 2.6 million Americans receiving

federal retirement benefits could not determine whether they were being treated unlawfully. *See, e.g.*, *Wos v. E.M.A.*, 568 U.S. 627, 653 (2013) (Roberts, C.J., dissenting) (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989)) (discussing the "obvious and familiar" "reasons for drawing a bright line"); U.S. Office of Personnel Management, Statistical Abstracts Fiscal Year 2017: Federal Employee Benefit Programs 21-22 (Jan. 2018). In the words of Chief Justice Marshall, courts would be "driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power." *McCulloch*, 17 U.S. (4 Wheat.) at 430.

CONCLUSION

The judgment of the Supreme Court of Appeals of West Virginia should be reversed.

Respectfully submitted,

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AUGUST 28, 2018

No. 17-419

In the Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, prohibits the State of West Virginia from exempting from state taxation the retirement benefits of certain former state law-enforcement officers, without providing the same exemption for the retirement benefits of former employees of the United States Marshals Service.

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INTRODUCTION

Like virtually all retired federal, state, and local employees in West Virginia, and unlike any private-sector retirees, James Dawson is entitled to exempt the first $2,000 of his retirement income when calculating his state income tax. W. Va. Code § 11-21-12(c)(5). Petitioners argue that West Virginia's refusal to allow them to claim a larger exemption available to a surpassingly small number of state retirees who participate in specific state-managed retirement plans unfairly discriminates against Mr. Dawson *as a federal retiree*. The West Virginia Supreme Court of Appeals rightly rejected this claim.

The intergovernmental tax immunity doctrine petitioners invoke, as codified in 4 U.S.C. § 111, does not police the minutia of state tax policy. The doctrine has always been concerned with how sovereigns relate to each other in our federal system—barring discrimination against co-sovereigns to avoid interference with the essential functions of one government through the taxing powers of another. Petitioners urge the Court to transform this structural protection into a tool for individual federal workers to force States into giving them the most favorable tax treatment available to any state employee. Yet where a State treats federal retirees the same as the vast majority of its own retired workforce, and even better than it treats all private-sector and some state retirees, the principles animating the tax immunity doctrine do not hold sway.

Petitioners' claim also fails because the state tax exemption they challenge, West Virginia Code § 11-21-12(c)(6), does not distinguish among taxpayers

based on whether the State or federal government signs a retiree's monthly benefits check. Petitioners cannot show that Mr. Dawson is similarly situated to the state retirees eligible for the exemption, as their attempts in state court to compare Mr. Dawson to different and sometimes inconsistent classes of state law enforcement officers show. There are also meaningful differences between retired U.S. Marshals like Mr. Dawson and the state retirees who contributed to (and now receive benefits from) the retirement plans Section 12(c)(6) names. These differences justify the State's policy choice not to expand its tailored, discrete exemption regime—particularly because they make clear that Mr. Dawson is more like the vast majority of state retirees who do *not* receive the challenged exemption than those who do.

STATEMENT

1. The doctrine of intergovernmental tax immunity constrains both States and the federal government from using their respective taxing authority to cause "undue interference, through the exercise of that power, with the governmental activities of the other." *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 477-78 (1939). The States' immunity "arises from the constitutional structure and a concern for protecting state sovereignty"; the federal government's flows "from the Supremacy Clause." *South Carolina* v. *Baker*, 485 U.S. 505, 518 n.11 (1988). This Court first recognized the doctrine in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which invalidated a state tax on notes issued by the Bank of the United States, but no state-

chartered banks. *Id.* at 436-37; see also, *e.g.*, *United States* v. *Cty. of Fresno*, 429 U.S. 452, 457-58 (1977).

In the century after *McCulloch*, the Court embraced an increasingly "expansive" view of intergovernmental tax immunity, "invalidating, among many others, state taxes on the income of federal employees; on income derived from property leased from the Federal Government; and on sales to the United States." *United States* v. *New Mexico*, 455 U.S. 720, 731 (1982) (citations omitted); see also *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 173-74 (1989). Reasoning that a State's power to tax entities the federal government uses to execute its legitimate purposes could undermine those ends, see *McCulloch*, 17 U.S. (4 Wheat.) at 432, the Court began to find concern with nearly *any* state tax on the federal government or one of its instrumentalities. *E.g.*, *Cty. of Fresno*, 429 U.S. at 460 & n.8; *Weston* v. *City Council of Charleston*, 27 U.S. (2 Pet.) 449, 467 (1829). During this period the tax immunity doctrine was interpreted to bar not only direct taxation of federal entities, but also taxes on federal employees' salaries or income "derived from *any* contract with another government." *Baker*, 485 U.S. at 517; see also *Dobbins* v. *Comm'rs of Erie Cty.*, 41 U.S. (16 Pet.) 435, 449 (1842).

This broad approach to intergovernmental tax immunity soon became untenable; by the 1930s the doctrine had become "divorced both from [its] constitutional foundations" and "'the actual workings of our federalism,'" *New Mexico*, 455 U.S. at 731-32 (quoting *Graves*, 306 U.S. at 490). Now, the view that reigned after *McCulloch* "has been thoroughly

repudiated by modern intergovernmental immunity caselaw." *Baker*, 485 U.S. at 520.

Return to the *McCulloch* framework began with this Court's 1937 decision in *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937), which "upheld a state tax on the gross receipts of a contractor providing services to the Federal Government." *New Mexico*, 455 U.S. at 731-32. The doctrinal shift became more apparent still a year later in *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938), where the Court upheld a federal tax on state employees that did not unduly burden or obstruct the States' functions. *Id.* at 420-21.

In 1939, *Graves* used similar reasoning to overrule the Court's earlier cases that had prohibited state taxes on the salaries of federal employees. See 306 U.S. at 486. That interpretation had become a tool to unfairly relieve federal employees "from contributing their share of the financial support of the other government, whose benefits they enjoy." *Id.* at 483. More to the point, it did not advance the constitutional doctrine's goal of "prevent[ing] undue interference" with another sovereign's operations. *Id* at 484. Although some part of the burden from state taxes on federal employees will always be passed onto the federal government, *Graves* held that where the state tax is non-discriminatory, this burden is "the normal incident of the organization within the same territory of two governments, each possessing the taxing power." *Id.* at 487.

Also in 1939—after *Helvering* but before the decision came down in *Graves*—Congress considered a legislative solution to resolve uncertainty about

States' authority to tax federal employees. In Section 4 of the Public Salary Tax Act of 1939, Pub. L. No. 76-32, ch. 59, § 4, 53 Stat. 575, Congress ultimately gave its express consent to nondiscriminatory state taxation on the federal workforce. Now codified at 4 U.S.C. § 111(a) ("Section 111"), this statute provides:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

Section 111 essentially codified the narrow approach to intergovernmental tax immunity this Court adopted, as a constitutional matter, in *Graves*. *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 812-13 (1989). "[T]he retention of immunity in § 111" is thus "coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." *Id.* at 813; see also *id.* at 813-14 ("Regardless of whether § 111 provides an independent basis for finding immunity or merely preserves the traditional constitutional prohibition against discriminatory taxes, however, the inquiry is the same.").

2. The Court revisited intergovernmental tax immunity almost thirty years ago in the context of state taxes on federal retirement benefits. In *Davis* v. *Michigan Department of Treasury*, the Court invalidated a state tax that broadly exempted "all retirement benefits" from state and local entities, but no "retirement benefits paid by all other employers, including the Federal Government." 489 U.S. at 805. Framing the inquiry, the Court explained that the "imposition of a heavier tax burden on [those who deal with one sovereign] than is imposed on [those who deal with the other] must be justified by significant differences between the two classes." *Id.* at 815-16 (alterations in original) (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)). Noting it was "undisputed" that the challenged exemption "discriminate[d] in favor of retired state employees and against retired federal employees," *id.* at 814, the Court proceeded to the second step in the analysis, and found no meaningful differences between state and federal retirees to warrant that treatment, *id.* at 816-17.

The Court applied the same two-part test three years later in *Barker* v. *Kansas*, 503 U.S. 594 (1992), holding that a tax regime exempting state, local, and most federal civil retirees' benefits, but not federal military retirement benefits, violated Section 111. *Id.* at 596 n.1, 605. Another seven years later, however, the Court refused to expand the intergovernmental tax immunity doctrine further, emphasizing "the tight limits" of Section 111 and the modern constitutional approach. *Jefferson Cty.* v. *Acker*, 527 U.S. 423, 436 (1999). There, federal judges challenged a county

occupational tax on anyone who worked within the county and did not pay any state license fee, arguing that—as federal employees in an unlicensed occupation—they could never qualify for the exemption. *Id.* at 427, 433. Yet because the tax applied to other unlicensed *state* employees, not simply federal employees, the Court concluded that the "record show[ed] no discrimination . . . between similarly situated federal and state employees." *Id.* at 443.

3. In West Virginia, taxable income is defined by reference to federal adjusted gross income, and includes income derived from most private, federal, state, and local retirement plans. W. Va. Code § 11-21-12(a), (c); Pet. App. 2a. All retirees—from the private or public sectors—may subtract the first $8,000 of income from their adjusted gross income after age sixty-five, or if the taxpayer becomes permanently disabled. W. Va. Code § 11-21-12(c)(8).

West Virginia law provides additional exemptions for all federal and most state and local retirees. The West Virginia Public Employees Retirement System ("PERS") and the West Virginia State Teachers Retirement System ("TRS") are—by far—the largest state-run public retirement systems. In tax year 2010, these two plans encompassed 52,167 of the State's 53,184 retirees. J.A. 28; Pet. App. 13a. PERS is the general plan for state retirees not covered by a more specific plan, and also provides benefits to retirees from many participating counties, cities, and municipalities. J.A. 126. Active employees in PERS hired before 2015 contribute 4.5% of their gross monthly salary to fund the plan (those hired later

contribute 6%), and after retirement members receive a monthly annuity calculated as a factor of their highest three-year average salary. J.A. 44-46; W. Va. Code § 5-10-29(b) (2009), *amended in* 2015 W. Va. Acts, c. 204 (increasing contribution rate to 6% for individuals hired after January 1, 2015). TRS provides retirement benefits for public-school teachers and school personnel, and is partially funded by employee contributions at 6% of gross monthly salary. J.A. 53-56; W. Va. Code § 18-7A-14(a).

PERS and TRS members may subtract from their adjusted gross income the first $2,000 of their state retirement benefits. W. Va. Code § 11-21-12(c)(5). This Section 12(c)(5) exemption also applies to benefits paid from any federal retirement system. *Id.* It does not, however, apply to benefits from the Judges' Retirement System, which includes most retired state circuit judges and supreme court justices. Pet. App. 15a.

For tax years beginning after December 31, 2017, West Virginia also exempts from state income tax all federal military retirement income, W. Va. Code § 11-21-12(c)(7)(C)—an increase from a $20,000 exemption that applied from 2000 through 2017, *id.* § 11-21-12(c)(7)(B) (2016). The recent amendment to exempt all military retirement benefits is consistent with a larger state trend, after *Davis*, of increased exemptions for federal retirees: In 1989 the West Virginia Legislature added federal benefits to the general $2,000 exemption for public-sector retirees, 1989 W. Va. Acts, c. 201, and created the additional exemption for military retirees in 2000, 2000 W. Va. Acts, c. 263.

4. In addition to these broader exemptions, West Virginia Code § 11-21-12(c)(6) allows a small number of state and local retirees—comprising less than 2% of West Virginia's public retirees—to exempt all retirement benefits from their gross adjusted income. W. Va. Code § 11-21-12(c)(6); Pet. App. 16a. This Section 12(c)(6) exemption applies to income received from four small state-run retirement systems that provide benefits to some state and local firefighters and law enforcement officers: The State Police Death, Disability, and Retirement Fund ("Trooper Plan A"); the State Police Retirement System ("Trooper Plan B"); the Municipal Police Officer and Firefighter Retirement System ("MPFRS"); and the Deputy Sheriff Retirement System ("DSRS"). Pet. App. 3a.

Trooper Plan A was the original retirement system for the West Virginia State Police, covering officers hired before March 12, 1994. J.A. 68. Trooper Plan B covers state police officers hired after Trooper Plan A's cut-off date. J.A. 76. In tax year 2010, 701 retirees drew benefits from these plans. J.A. 28. Members who retire under Trooper Plans A and B are not eligible for social security benefits. J.A. 28, 33, 38.

A small number of municipal police officers and firefighters are members of MPFRS. Before this plan's creation in 2010, some municipalities managed separate retirement plans for their employees, and others elected to participate in PERS. J.A. 126, 233. Cities and municipalities may now choose to provide police and firefighter benefits through the state-

managed MPFRS, although few have chosen to do so. J.A. 28, 33, 38.[1]

DSRS members include all county deputy sheriffs hired on or after July 1, 1998, and deputy sheriffs hired earlier if they chose to transfer their years of service to the new plan. J.A. 84; Pet. App. 13a. Deputy sheriffs not covered by DSRS draw benefits from PERS, and are accordingly ineligible for the Section 12(c)(6) exemption. Pet. App. 13a, 15a-16a. In 2010, 260 retirees received benefits under DSRS. J.A. 28. Unlike members of Trooper Plans A and B, DSRS members are eligible to receive social security benefits. J.A. 28, 33, 38.

Although members of these four plans receive more favorable tax treatment after retirement than their counterparts in PERS and TRS, they are also required to contribute higher percentages of their monthly salaries while active employees. As compared to 4.5% and 6%, J.A. 46, 53, members of Trooper Plan A contributed 9% of their monthly gross income. J.A. 69; see also W. Va. Code § 15-2-26(b). Those in Trooper Plan B contribute 13%, and MPFRS and DSRS members contribute 8.5%. J.A. 28, 33, 38, 77, 85, 101; see also W. Va. Code §§ 7-14D-7(a), 8-22A-8(a)(1), 15-2A-5(a).

Significantly, Section 12(c)(6) is not a general law enforcement exemption. Many West Virginia state

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[1] A small, unknown number of retirees covered by municipal retirement plans predating MPFRS may also be eligible for the Section 12(c)(6) exemption. J.A. 233; W. Va. Code § 11-21-12(c)(6) (describing retirees under "any West Virginia police, West Virginia Firemen's Retirement System").

and local law enforcement officers may claim only the $2,000 exemption in Section 12(c)(5). The default retirement plan for county sheriffs, for example, is PERS; only sheriffs who served first as a deputy sheriff and meet other statutory requirements may participate in DSRS. J.A. 84; W. Va. Code §§ 5-10-17, 7-14D-24. West Virginia Department of Natural Resources ("DNR") police officers and state capitol police officers also draw benefits from PERS, even though they also possess law enforcement powers. Pet. App. 13a-14a; J.A. 167-68; see also W. Va. Code §§ 5-10-17, 15-2D-2, 20-7-1 *et seq.* Similarly, some retired law enforcement officers do not receive the Section 12(c)(6) exemption even though they had identical jobs to those who do—including police officers in the many municipalities that still participate in PERS, J.A. 126, and deputy sheriffs hired before 1998 who chose to remain in PERS, J.A. 84; Pet. App. 13a.

Further, the percentage of retirees eligible under Section 12(c)(6) is decreasing. In 1994, the exemption applied to roughly 1,600 retirees, or 4% of all state and local retirees. *Brown* v. *Mierke*, 191 W. Va. 120, 443 S.E.2d (W. Va. 1994); Pet. App. 15a. As of 2010, the number of retirees in the four enumerated state-run plans was under 1,000. J.A. 28. And with the number of retirees covered by PERS and TRS increasing during that same period, the percentage of retirees in the four exempted plans has fallen to under 2%. Pet. App. 16a; J.A 28; see also *id.* at 33 (similar percentage for 2011), 38 (similar percentage for 2012).

5. James Dawson is a retired U.S. Marshal for the Southern District of West Virginia. Pet. App. 4a; J.A.

175, 182-83. Before joining the United States Marshal Service, Mr. Dawson served for over a decade as a deputy sheriff in Nicholas County, West Virginia. J.A. 174-76. He left state law enforcement in 1987 to become a Deputy U.S. Marshal, and was appointed as a U.S. Marshal in 2002. J.A. 175, 195.

Mr. Dawson retired on March 31, 2008, J.A. 182, and began receiving a monthly annuity under the Federal Employees Retirement System ("FERS"). J.A. 8, 183. FERS was created in 1986 as the general retirement plan for federal civilian retirees. See Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986). Mr. Dawson's benefits under FERS—$56,724 for tax years 2010 and 2011, J.A. 254—are calculated based on a percentage of the average salary for his three highest compensation years, with adjustments for survivor benefits for his wife and supplemental payments until he becomes eligible to receive social security benefits. J.A. 9-10, 254.

Like all FERS members, while an active employee Mr. Dawson was required to contribute a portion of his salary to fund his retirement plan. J.A. 17; see also 5 U.S.C. § 8422(a)(2) (FERS contribution formula). Members' contribution rates are calculated starting from the base contribution rate for federal law enforcement officers set out in 5 U.S.C. § 8422(a)(3). Old-age, survivor, and disability insurance tax rates are then subtracted from that rate, as provided in 26 U.S.C. § 3101(a). Using this formula, Mr. Dawson was required to contribute between 1.3% and 1.8% of his gross monthly salary

toward FERS throughout his twenty-one years in the federal workforce.[2]

In October 2013, Mr. Dawson and his wife Elaine filed amended West Virginia state tax returns for tax years 2010 and 2011 claiming a full exemption for all income Mr. Dawson received under FERS. J.A. 251. The West Virginia State Tax Commissioner denied their request, explaining that under West Virginia Code § 11-21-12(c)(5) they were entitled to subtract from their adjusted gross income only the first $2,000 of Mr. Dawson's FERS retirement benefits. J.A. 252; Pet. App. 4a.

6. The Dawsons appealed the denial to the West Virginia Office of Tax Appeals ("OTA"). Pet. App. 4a. They argued that because Section 12(c)(6) allows some retired state and local law enforcement officers to exempt all state retirement benefits from reported income, refusing to treat Mr. Dawson's federal benefits the same violates 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity. Pet. App. 4a-5a. Comparing Mr. Dawson primarily—although not exclusively—to deputy sheriffs who retire under the DSRS plan, J.A. 175-76, 241-42

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[2] The base contribution rate for Mr. Dawson was 7.5% between 1987 and 1998, 7.75% in 1999, 7.9% in 2000, and 7.5% from 2001 to 2008. 5. U.S.C. § 8422(3)(A)-(B). The tax rate for old-age, survivor, and disability insurance, in turn, was 5.7% in 1987, 6.06% in 1988 and 1989, and 6.2% from 1990 on. 26 U.S.C. § 3101 (2012), *amended by* Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, Div. A, Title II, § 221(a)(99)(A), 128 Stat. 4010, 4051 (2014), *and* Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, Div. U, Title IV, § 401(a)(207), 132 Stat. 348, 1194 (2018).

(comparisons to sheriffs, deputy sheriffs, and law enforcement officers generally), they argued that Mr. Dawson's responsibilities as a U.S. Marshal were substantially similar to the duties of state and local law enforcement officers in West Virginia. J.A. 175-77, 241. OTA rejected the Dawsons' arguments and affirmed the Tax Commissioner's decision. Pet. App. 5a.

The Dawsons next appealed to the Circuit Court of Mercer County, West Virginia. Here, Mr. Dawson compared himself to both deputy sheriff retirees under DSRS and the state police officers who retire under Trooper Plan A. J.A. 273-74. The circuit court reversed OTA's decision, in part based on its finding that it was "undisputed . . . that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers listed in § 11-21-12(c)(6)." Pet. App. 22a. Reasoning that the intergovernmental tax immunity doctrine forbids providing different tax treatment to state and federal retirees who performed similar job duties, the circuit court deemed the Section 12(c)(6) exemption to impermissibly discriminate against federal retirees. Pet. App. 22a-25a.

7. The West Virginia Supreme Court of Appeals reversed the circuit court's order on May 17, 2017. Pet. App. 16a.

The Supreme Court of Appeals relied heavily on its 1994 decision in *Brown* v. *Mierke*, which, applying this Court's decision in *Davis*, Pet. App. 10a, had rejected a previous challenge to Section 12(c)(6) brought by federal military retirees. Pet. App. 9a-12a.

The court noted that in cases where this Court "found a state tax exemption improperly discriminated against federal retirees under 4 U.S.C. § 111," the challenged law "had afforded a blanket exemption to *all* retirees." Pet. App. 10a. By contrast, "West Virginia's limited, multi-tiered series of tax exemptions" in Section 12(c)(6) indicated no intent to discriminate against federal retirees. Pet. App. 10a-11a. When *Brown* was decided the exemption applied to roughly 4% of state and local retirees. Pet. App. 11a. The challengers in *Brown* received better treatment than all private-sector retirees, and the same or better treatment than state and local retirees, Pet. App. 11a-12a. Thus, under a "totality of the circumstances" approach, *Brown* held that the Section 12(c)(6) exemption does not "discriminate against [federal retirees] because of the *source* of pay or compensation." Pet. App. 11a (quoting Syl. pt. 2, *Brown*, 191 W. Va. at 121, 443 S.E.2d at 463).

The state supreme court reached the same result below. Although recognizing the parties' arguments that the Dawsons' tax treatment was justified by significant differences between the relevant classes of retired state and federal employees, Pet. App. 12a-13a, the court did not reach this question. Instead, it held that Section 12(c)(6) "did not discriminate against Mr. Dawson" "[i]n light of the totality of the circumstances, and the totality of the structure of West Virginia's tax and retirement scheme." Pet. App. 15a.

The court emphasized that Section 12(c)(6) "applies to a narrow but diverse class of state retirees." Pet. App. 13a. In the two decades since

Brown, the percentage of retirees eligible for the exemption had decreased from 4% to "less than two percent." Pet. App. 13. Mr. Dawson's retirement income was treated more favorably than state private-sector retirees and retired state supreme court justices and circuit judges, and the same as that of "the vast majority of all state retirees." Pet. App. 15a. The court also emphasized that not all state and local law enforcement officers receive the exemption, including some deputy sheriffs who (like Mr. Dawson) started working before DSRS was created in 1998. Pet. App. 13a, 15a-16a. Viewed in context with the entire West Virginia retirement tax scheme, the court concluded that "Section 12(c)(6) gives a benefit to a very narrow class of former state and local employees," and therefore does not violate Section 111 and intergovernmental tax immunity. Pet. App. 16a.

SUMMARY OF THE ARGUMENT

A state tax violates intergovernmental tax immunity where it imposes "a heavier tax burden on [those who deal with one sovereign] than is imposed on [those who deal with the other]," and where that inconsistent treatment is not "justified by significant differences between the two classes." *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 815-16 (1989) (alterations in original) (citations omitted). Neither condition is satisfied here.

West Virginia Code § 11-21-12(c)(6) provides a tax exemption for a small number of state and local retirees drawing benefits from a handful of state-managed plans. Eligibility for Section 12(c)(6) does not turn on whether a retiree worked for the state or the federal government. Rather, like other federal

and state retirees, U.S. Marshals like Mr. Dawson may not claim the exemption because they receive benefits from a different retirement plan. Section 12(c)(6) accordingly does not discriminate against federal retirees "because of the source of [their] pay or compensation." 4 U.S.C. § 111(a).

I. Section 12(c)(6) passes the first step in the intergovernmental tax immunity analysis because this granular exemption, providing a benefit to a very small number of state and local retirees, does not create the type of inconsistent tax treatment with which Section 111 is concerned.

A. From the doctrine's earliest days, its purpose has been to prevent discrimination against sovereigns in our federal system. Intergovernmental tax immunity was never intended to confer benefits on individual taxpayers, but rather to prevent interference with the sovereign functions of one government through the exercise of a co-sovereign's taxing power. In the 1930s, the Court reined in an earlier line of cases that had expanded the doctrine beyond this core purpose, emphasizing that the "only possible basis" for constitutional immunity from a state income tax is the concern that its economic burden will be passed onto the federal government. *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 481 (1939). So too for the modern version of the doctrine, codified in 4 U.S.C. § 111, which consciously retained this historical, purpose-driven rationale.

Viewed in context with West Virginia's income-tax structure as a whole, Section 12(c)(6) has no more than remote consequences for the federal government. Unlike tax exemptions struck down in previous cases

that broadly preferred all state retirees, Section 12(c)(6) applies to less than 2% of West Virginia's public-sector retired workforce. This Court has never endorsed petitioners' theory, Pet. Br. 24, that a State discriminates where even one state employee receives more favorable tax treatment than federal employees. To the contrary, it upheld another narrow exemption where, as here, some state employees were also required to pay the tax. *Jefferson Cty.* v. *Acker*, 527 U.S. 423, 443 (1999). Section 12(c)(6)'s limited reach also means that the political process provides meaningful accountability against discriminatory taxation: Here, the interests of all private-sector retirees, all federal retirees, and the overwhelming majority of state retirees are aligned.

B. Section 12(c)(6) survives the first step of the Section 111 analysis even under an approach focused less on sovereigns, and more on the interests of individual taxpayers. At a minimum, the tax immunity doctrine is not offended where a State treats similarly situated state and federal retirees the same. Looking at the distinction Section 12(c)(6) draws—membership in one of four state-managed retirement plans—makes clear that West Virginia does not have a general tax exemption covering all state and local law enforcement officers. Not all law enforcement officers may receive the exemption, including some with identical job titles to those who do. Mr. Dawson is treated no differently than those state retirees who, like him, draw benefits from different public-retirement plans. Petitioners' contrary framework would have the Court focus on Mr. Dawson's job duties as a U.S. Marshal, but that

approach cannot answer whether he is similarly situated to the state law enforcement officers who receive the exemption, or to those who do not.

II. Even if Section 12(c)(6) subjected comparable state and federal retirees to different tax treatment, significant differences between the classes of retirees more than justify that decision. Financial distinctions related to the contribution- and benefits-structures of the exempted state plans warrant different treatment between their members and those of other *state-managed* retirement plans, as well as members of federal retirement plans like the one covering retired U.S. Marshals. Tax policies based on plan-specific distinctions like these are essential to the State's role as employer, and help ensure that federal retirees receiving benefits from plans with meaningfully different features—like Mr. Dawson—do not receive *better* treatment than their true state counterparts.

ARGUMENT

Not all taxes treating state and federal employees differently violate the intergovernmental tax immunity doctrine. As reflected in 4 U.S.C. § 111, this doctrine prohibits only those distinctions that discriminate against federal employees "because of the source of the pay or compensation." The Court uses a two-part test to discern whether a challenged tax is one of the many, permitted distinctions among taxpayers common throughout state (and federal) tax codes, or instead turns on the one basis Section 111 forbids: the name at the bottom of a public retiree's benefits check. *First*, the challenged provision must result in "inconsistent," discriminatory tax treatment against those who deal with the federal government;

and *second*, there must be no significant differences to justify that distinction. *Barker* v. *Kansas*, 503 U.S. 594, 598 (1992) (citation omitted). Section 12(c)(6) passes on both counts.

I. Section 12(c)(6) Does Not Discriminate Against The Federal Government Or Federal Employees.

Davis v. *Michigan Department of Treasury*, 489 U.S. 803 (1989), does not answer what it means for a State's income-tax exemption regime to discriminate against federal retirees. It was "undisputed" in *Davis* "that Michigan's tax system discriminates in favor of retired state employees and against retired federal employees," *id.* at 814, and for good reason: The State exempted *all* state and local retirement benefits, but collected income tax on retirement benefits from *every* other source, including the federal government. *Id.* at 805. *Barker*, involving a similarly broad state-exemption regime, did not delve into this fundamental question either. See 503 U.S. at 596; Pet. Br. 16 (acknowledging there was "no dispute" in *Barker* "[a]t the first step of the analysis").

Petitioners are thus wrong that, under this Court's precedents, the threshold question of discrimination against retired federal employees is satisfied "as long as *any* state retirees were treated better than federal retirees." Pet. Br. 24. *Davis* and *Barker* did not resolve whether a statute like Section 12(c)(6)—which applies to a decreasingly small number of state employees and is part of a state tax code that otherwise treats federal retirees the same as or better than most of its own workforce—violates

Section 111. As the West Virginia Supreme Court of Appeals correctly held, it does not.

In the almost three decades since *Davis* was decided, no state or federal court has invalidated a discrete, tailored tax provision like Section 12(c)(6). This result was not for lack of legislative or judicial vigilance: In *Davis*'s wake many States amended their tax codes to remove provisions broadly favoring state employees at the expense of federal workers. See, *e.g.*, 1989 Ariz. Sess. Laws, c. 312, § 12 (replacing full tax exemption for state retirement benefits with equal $2,500 exemption for state and federal retirees); 1989 Colo. Sess. Laws, c. 332, § 1 (expanding $20,000 exemption for all sources of state and private retirement income to include federal military retirement benefits); 1989 N.Y. Laws, c. 664, § 1 (adding total exemption for federal pensions to match pre-existing exemptions for state and local retirees). Courts, too, invalidated statutes that looked much like *Davis*'s total exemption for all state retirees. See, *e.g.*, *Pledger* v. *Bosnick*, 306 Ark. 45, 47, 811 S.W.2d 286, 288 (1991), *abrogated on other grounds*, *State, Dep't of Fin. & Admin.* v. *Staton*, 325 Ark. 341, 344, 942 S.W.2d 803, 807 (1996).

What legislatures and courts did not do, however, was amend or strike down tax provisions at Section 12(c)(6)'s degree of granularity. This is because Section 111 has never been understood to apply to cases like these—and nothing in this Court's intergovernmental tax immunity precedents supports ruling now that it does. *First*, the history and purpose of the doctrine make clear that it is concerned with big-picture, broad-strokes interactions between

sovereigns, and how those interactions shape internal government operations. Individual employees benefit from this immunity, but Section 111 is not defined by reference to them. Section 12(c)(6) does not hinder the federal government's operations and, viewed in context with West Virginia's tax regime as a whole, its minimal scope does not discriminate against the federal government or its employees. *Second*, even removing Section 111 from its proper historical vantage point and applying the individual-focused framework petitioners urge, Section 12(c)(6) still does not offend intergovernmental tax immunity because West Virginia tax law treats similarly situated state and federal retirees the same. The Court should affirm.

A. A Discrete, Narrow Tax Regime Benefiting A Small Number Of State Retirees Does Not Implicate The Intergovernmental Tax Immunity Doctrine's Concerns.

1. From this Court's decision in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), holding that States may not single out a federal bank for a tax they decline to impose on their own institutions, the focus of intergovernmental tax immunity has always been to prevent discrimination against sovereigns. The tax in *McCulloch* "was aimed specifically at national banks and thus operated to discriminate against the exercise by the Congress *of a national power*." *Helvering* v. *Gerhardt*, 304 U.S. 405, 413 (1938) (emphasis added). The doctrine's applications multiplied with time, but "*[s]uch discrimination*" remained the basis "for holding invalid any form of state taxation adversely affecting the use or

enjoyment of federal instrumentalities." *Id.* (emphasis added).

Of course, after *McCulloch* the doctrine became untethered from this original understanding of the type of discrimination it bars. At its extreme, intergovernmental tax immunity was extended to bar even most *indirect* taxes on the federal government, including state taxation of federal employees' and contractors' income. See *United States* v. *New Mexico*, 455 U.S. 720, 731 (1982). The Court, however, eventually course-corrected, returning to the doctrine's "constitutional foundations," *id.*, and setting "tight limits" for the future," *Jefferson Cty.* v. *Acker*, 527 U.S. 423, 436 (1999).

This means that the nondiscrimination clause in Section 111—"coextensive" with and "consciously drafted against the background of the Court's tax immunity cases"—must be understood in reference to the purposes the doctrine has advanced "from the time of *McCulloch*." *Davis*, 489 U.S. at 812-13. At bottom, those purposes reflect "the need to protect each sovereign's governmental operations from undue interference by the other." Pet. App. 7a (quoting *id.* at 814). Intergovernmental tax immunity exists to prevent "clashing sovereignty." *New Mexico*, 455 U.S. at 735 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 430); see also *Cal. State Bd. of Equalization* v. *Sierra Summit, Inc.*, 490 U.S. 844, 847 (1989). It strikes down taxes that create "crippling obstruction of any of the Government's functions," or "sinister effort[s] to hamstring its power." *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 495 (1958). And it "provide[s] a safeguard for federal operations." PAUL J. HARTMAN,

FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 6.1, at 220 (1981).

This Court's 1930s precedents, marking a return to the doctrine's roots, only underscore the importance of viewing tax immunity in functional, historical terms. Those cases again explained that a primary reason non-discriminatory state taxes do not offend intergovernmental tax immunity is because "there is only a remote, if any, influence upon the exercise of the functions of the government." *New Mexico*, 455 U.S. at 732 (citation omitted). Indeed, *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939) emphasized that "the *only possible basis* for implying a constitutional immunity from state income tax" on federal employees "is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions." *Id.* at 481 (emphasis added). In *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937), by contrast, the Court did not hesitate to uphold a tax that did not "interfere in any substantial way with the performance of federal functions." *Id.* at 161.

These purposes make clear that the tax immunity doctrine is not an individual right to avoid less-favorable tax treatment, nor can it bear the weight of an interpretation that would strike down state laws with no more than "remote" consequences for the federal fisc.

To be sure, individual retirees may invoke the doctrine, *Davis*, 489 U.S. at 814-15, but that means they may benefit from it, not that it should be

redefined in individual terms. Both the House and Senate Reports on the Public Salary Tax Act of 1939 indicate that Section 111's nondiscrimination clause was not drafted to be an individual protection against state taxation, but "[t]o protect the Federal Government" from "State and local taxation" of federal compensation "which is aimed at, or threatens [its] efficient operations." H.R. Rep. No. 76-26, at 5 (1939); S. Rep. No. 76-112, at 12 (1939). Even in *Davis*, the Court grounded its holding in the doctrine's purpose to protect sovereigns from each other's taxing powers, *Davis*, 489 U.S. at 810-12, and emphasized that Section 111's "nondiscrimination clause closely parallels the nondiscrimination component of the constitutional immunity doctrine" dating back to *McCulloch*. *Id.* at 812.

Further, the doctrine was never intended to be used as a tool to "confer benefits on the [federal] employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy." *Graves*, 306 U.S. at 483; see also *South Carolina* v. *Baker*, 485 U.S. 505, 525 (1988). To the contrary, Section 111 was crafted to eliminate the injustice of exempting public employees from "shar[ing] in the cost of their State and local governments to the same extent as private employees." S. Rep. No. 76-112, at 4; see also H.R. Rep. No. 76-26, at 1. Absent an unduly broad interpretation of intergovernmental tax immunity, federal employees thus have no basis to challenge state tax provisions with consequences for the federal government so slight that it is impossible to say they "interfere in any substantial way with the

performance of federal functions." *Dravo*, 302 U.S. at 161.

2. The Court should reject petitioners' attempt to transform a shield for co-sovereign relations into a sword for taxpayers seeking preferred treatment.

As an initial matter, petitioners object (at 18-19) to the state court's reliance on "the totality of the circumstances, and the totality of the structure of West Virginia's tax and retirement scheme." Pet. App. 15a. There is no error in this approach. Step 1 in the Section 111 analysis—whether a challenged tax imposes a "heavier burden" on federal employees than on state employees, *Davis*, 489 U.S. at 815-16—was undisputed in both *Davis* and *Barker*. *Id.* at 814; *Barker*, 503 U.S. at 596; Pet. Br. 16. These cases thus do not "clearly reject[]," Pet. Br. 18-19, a robust inquiry into a state tax code and the interests intergovernmental tax immunity protects. At most, they teach that the first step is satisfied where a tax discriminates against federal employees in terms similar to the *Davis* exemption's breadth. Far from "refus[ing] to apply *Davis*," Pet. Br. 22, the state supreme court therefore approached this unresolved question mindful of the same purposes animating the doctrine on which *Davis* itself relied. See *Davis*, 489 U.S. at 810-12. Indeed, petitioners would replace the state court's multi-faceted analysis with a rule deeming the first step satisfied whenever "*any* state retirees [are] treated better than federal retirees," Pet. Br. 24—with no explanation how this mechanistic approach advances the immunity doctrine's historical ends.

Whether styled a totality-of-the-circumstances or purpose-based inquiry, applying the proper framework makes clear that Section 12(c)(6) does not discriminate against federal employees in any way relevant to the doctrine of intergovernmental tax immunity.

First, any concerns about interfering with the sovereign functions of the United States government are at their lowest where, as here, a tax exemption applies to only a small number of state and local employees: less than 2%. Pet. App. 16a. At that point, the idea that the "economic burden" the tax poses could somehow be passed onto the federal government so as to interfere with its functions—the "only possible basis" for constitutional immunity from state taxes on federal employees, *Graves*, 306 U.S. at 481—becomes mere fiction.

By contrast, tax regimes that do offend intergovernmental tax immunity discriminate against federal employees in broad strokes, where the federal government *does* feel their repercussions. *Davis* and *Barker* exempted *all* retirement income from *all* state and local employees, while withholding the same treatment from federal retirees writ large, or the substantial category of federal military retirees. Similarly, *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376 (1960), struck down a tax that preferred almost all lessees who contracted with the State above all lessees who contracted with the federal government. And the Court's language there is telling: It describes the tax difference, "attendant upon the identity of [the] lessor," as "extreme," "substantial[,] and

transparent." *Id.* at 382, 387. The Supreme Court of Appeals was therefore right to find that the minimal differences Section 12(c)(6) works do not offend Section 111.

Petitioners (at 27-28; see also U.S. Br. 23-25) take issue with the state court's focus on Section 12(c)(6)'s intent to "benefit . . . a very narrow class of former state and local employees," rather than to "discriminate against former federal marshals." Pet. App. 16a. Yet while a good motive may not salvage an otherwise discriminatory tax, see *Davis*, 489 U.S. at 816 ("The State's interest in adopting the *discriminatory tax*, no matter how substantial, is simply irrelevant." (emphasis added)), petitioners are wrong that intent has no role to play. Lack of a *discriminatory* motive can be a relevant touchpoint in a way that existence of a *benevolent* motive is not: Evidence that a State singled out a federal entity for disfavored treatment was dispositive in *McCulloch*, for instance, see *Helvering*, 304 U.S. at 413, and *Phillips Chemical* spoke of "segregat[ing] federal lessees and impos[ing] on them a heavier tax burden," and the danger of "singl[ing] out those who deal with the Government," 361 U.S. at 382-83.

More importantly, though lack of animus or deliberate design to disfavor federal retirees was one part of the state court's analysis, it was not controlling. By emphasizing the "very narrow class" of state retirees who can claim the Section 12(c)(6) exemption, Pet. App. 16a, the court instead considered evidence of discriminatory intent as reflected in "the whole tax structure of the state." *Phillips Chem.*, 361 U.S. at 383; see also Pet. App. 15a. This approach—

looking beyond legislative motives to how a challenged provision actually operates—is another method to determine whether the tax draws distinctions based on source of income or some other (acceptable) factor, and whether its incidental effects on the federal government are the sort Section 111 forbids.

Petitioners and the United States also argue that Section 12(c)(6)'s minimal scope is irrelevant because *Davis* should extend to even small tax distinctions among state and federal employees. Pet. Br. 22-26; U.S. Br. 22-23. They are correct that *Davis* does not expressly limit its holding to cases involving blanket exemptions favoring all state retirees. But neither does *Davis* suggest the same outcome is appropriate, much less required, in cases involving narrow, discrete exemptions—as here.

Petitioners argue first that *Davis* referred to the challenged exemption as "blanket" only in the sense that it did not distinguish among taxpayers by income levels, and therefore the State could not justify it "by reference to such differences." Pet. Br. 22-23. That analysis is irrelevant here, however, because Section 12(c)(6) is not "blanket" in *any* sense: It does not apply to all state retirees, and it actually distinguishes taxpayers on the same basis that it purports to—by reference to their specific retirement plans. W. Va. Code § 11-21-12(c)(6). More to the point, the Court's choice of adjective does nothing to alter the nature of the challenged exemption, which, unlike Section 12(c)(6), favored all state retirees.

Petitioners next assert (at 23) that "it was irrelevant to the Court's analysis whether the class of

individuals who received the exemption consisted of all state retirees or just a subset of them." The United States similarly notes (at 22) that *Davis* and *Barker* turned on a lack of significant differences between state and federal retirees, not on "the number of state employees who were exempt." Yet the Step 1 inquiry was undisputed in both cases. Both were resolved at the second stage of the analysis, and the factors relevant *at step 2* say nothing about the appropriate considerations when the *initial* step is very much in dispute. For the same reasons, petitioners reach too far in claiming it "mere happenstance that the particular tax scheme [in *Davis*] applied to all state retirees." Pet. Br. 24. That "detail," *id.*, was the very reason the threshold question was "undisputed." *Davis*, 489 U.S. at 814. Indeed, the opinion's opening sentence emphasizes that the challenged regime exempted "all" state retirees' benefits while levying taxes on benefits paid by "all" other entities. *Id.* at 805.

The Court should also decline to read a categorical rule into *Davis*'s silence because it has already rejected that over-broad approach. *Jefferson County*, decided ten years after *Davis*, upheld a non-global tax exemption at Step 1 because it—like Section 12(c)(6)—applied to some state employees as well as federal. 527 U.S. at 443. The county's tax distinguished taxpayers based on their membership in a licensed or unlicensed profession, *id.* at 428-29, and like the hypothetical tax code *Davis* described, this was acceptable state tax policy because "an evenhanded application of the rationale . . . resulted in inclusion of some [state employees] in the

disfavored class," 489 U.S. at 817. Petitioners' approach, by contrast, would have reached a different result: Because Jefferson County's tax exemption treated at least some state employees better than federal employees, petitioners would have had the Court "proceed to consider whether 'significant differences'" justified the "differential treatment." Pet. Br. 24.

Petitioners also place more weight on *Jefferson County* than it can bear. Relying on dicta describing a "starkly different case" if the county had "exempted state officials while leaving federal officials (or a subcategory of them) subject to the tax," *Jefferson Cty.*, 527 U.S. at 443, petitioners argue that the Court would have reached the opposite outcome had the county "exempt[ed] just some of its employees," Pet. Br. 26. *Jefferson County* is the only time this Court has directly addressed exemptions affecting "subcategories" of state and federal employees, and—tellingly—it expressed concern about taxes on all "or a subcategory" of *federal* employees only. With every opportunity to make clear that the same concerns apply when a State exempts a subset of its own employees, the Court said nothing about "subcategories" on the state side. *Jefferson Cty.*, 527 U.S. at 443.

Finally, the United States (at 20-22) relies on Section 111's mandatory tenor to urge extending *Davis* to narrow exemption cases like this one. Yet this case does not require parsing "rigorous textual requirements" in a vacuum. *Id.* at 20-21 (quoting *Ross* v. *Blake*, 136 S. Ct. 1850, 1857 (2016)). Section 111 must be interpreted "coextensive" with the

"traditional constitutional prohibition against discriminatory taxes," including the doctrine's original aim to avoid interference with a sovereign's operations. *Davis*, 489 U.S. at 813-14. Like petitioners, the United States does not explain how an exceedingly narrow state tax provision like Section 12(c)(6) could have more than a "remote" effect on federal operations. Likewise, there is no doubt that Section 111 forbids even "*some* discrimination *based on source of pay*." U.S. Br. 20 (second emphasis added). The sticking point is how to determine when differential treatment is based on that prohibited factor. As *McCulloch*, *Helvering*, *Graves*, and more make clear, exemptions too narrow to affect the federal government are not. Because the purposes undergirding Section 111 are stretched too thin when applied to such discrete exemptions, the state supreme court correctly concluded that Section 12(c)(6) is too far beyond *Davis*'s—and Section 111's—bailiwick.

Second, there is an additional check against federal discrimination here that was lacking in *Davis* and *Barker*: the oversight and accountability of the ordinary political process. Where this safeguard is powerful enough to ward against discrimination, the grounds for applying intergovernmental tax immunity break down further still.

From its beginning, one of the key rationales for intergovernmental tax immunity has been a lack of adequate political checks against discriminatory tax policy. *McCulloch*, for instance, reasoned that when the *federal* government taxes state entities, it acts through representatives of the States, and

"consequently [those representatives] are subject to political restraints which can be counted on to prevent abuse." *Helvering*, 304 U.S. at 412; see also *McCulloch*, 17 U.S. (4 Wheat.) at 435-36. When, however, the Court recognized an implicit constitutional immunity doctrine against some forms of *state* taxation, the cornerstone of its analysis was this opposite reality: "State taxation of national instrumentalities is subject to no such restraint." *Helvering*, 304 U.S. at 412; see also *United States* v. *Cty. of Fresno*, 429 U.S. 452, 463 (1977) (describing "[t]he political check against abuse of the taxing power found lacking in *McCulloch*, where the tax was imposed solely on the Bank of the United States").

To be sure, this Court found the political-process rationale unpersuasive in *Davis* in light of the broad nature of the exemption regime under review. 489 U.S. at 815 n.4. Specifically, the majority rejected the view Justice Stevens championed in his dissent that Section 111 is not implicated where a tax "draws no distinction between the federal employees or retirees and the vast majority of voters in the State." *Id.* (quoting *id.* at 823 (Stevens, J., dissenting)); see also *Barker*, 503 U.S. at 606 (Stevens, J., and Thomas, J., concurring) ("A state tax burden that is shared equally by federal retirees and the vast majority of the State's citizens does not discriminate against those retirees."). The *Davis* majority relied on *Phillips Chemical*, where the Court struck down a tax that treated private and federal entities the same, yet gave a benefit to those who dealt with the State. 489 U.S. at 815 n.4. The missing piece from Justice Stevens's analysis, the majority emphasized, was consideration

of the distinct "danger" of discrimination that both cases highlighted "when the State acts to benefit *itself and those in privity with it.*" *Id.* (emphasis added). In other words, *Davis* rejected the idea that political checks are sufficient to guard against federal discrimination where federal employees and private parties are on one side, and all state employees are on the other—the special danger of state favoritism is too heavy a thumb on that scale.

Yet as the state court recognized, Pet. App. 12a, 15a, the same result does not follow where federal employees, private parties, and the vast majority of state employees are on the same side. The Court should not expand *Davis* to hold that it does. Although modern tax immunity challenges focus increasingly on personal income tax exemptions rather than, as in earlier cases, direct taxes on federal property, the doctrine's rationales remain the same. The *Davis* majority expressly emphasized that the "nondiscrimination clause [in Section 111] closely parallels the nondiscrimination component of the constitutional immunity doctrine" as understood from "the time of *McCulloch*," 489 U.S. at 812—the same *McCulloch* that weighed carefully the power political constituencies can wield to check abusive tax policy, 17 U.S. (4 Wheat.) at 435-36.

Davis accordingly did not "make[] clear that a state's treatment of private-sector retirees is irrelevant to the § 111 analysis." Pet. Br. 29. How a State treats retired private-sector employees is not the *sole* factor in this inquiry, but it would throw the pot out with the soup to find error in considering their treatment *alongside* evidence that "the vast majority

of all state retirees" receive similar treatment. Pet. App. 14a-16a. In any event, *Davis* certainly did not discard political accountability as a historical curiosity irrelevant to any future Section 111 case, regardless of its facts.

Under different facts—these facts—pressure from the political process is enough to outweigh the concern that States may discriminate against the federal government to benefit those with whom they deal. Here, the political checks found lacking in *McCulloch* are near their zenith: West Virginia treats federal retirees like Mr. Dawson "as well as it treats" *all but 2%* of "those with whom it deals itself." *Davis*, 489 U.S. at 815 n.4; Pet. App. 16a. This means that the interests of 100% of the private sector, 100% of federal employees, and over 98% of state employees push together. The danger when a State acts to benefit its own employees is significantly diminished where it acts to benefit so few of its own—and where, similar to the rest of the State's taxpayers, so many of its own employees pick up the tab for exemptions they cannot claim.

Further, political accountability is not a mere academic protection: The facts strongly bear out its reality. Since the Supreme Court of Appeals's decision in *Brown* v. *Mierke*, 191 W. Va. 120, 443 S.E.2d (W. Va. 1994), both the number and percentage of covered employees have gone down significantly. Pet. App. 13a, 16a. The Section 12(c)(6) exemption has not been expanded since 2000. See 2000 W. Va. Acts, c. 263 (adding DSRS to the list of exempted retirement plans). During the same time the exemption for state retirees diminished, the West

Virginia Legislature also enacted more preferential tax policies for *federal* retirees—adding a $20,000 exemption for federal military retirement income in 2002, 2002 W. Va. Acts, c. 312, and, just a year ago, making that exemption unlimited, W. Va. Code § 11-21-12(c)(7)(C) (2017). Where the line trends toward *better* tax treatment for federal retirees, not worse, there is no Section 111 violation. Indeed, it should come as no surprise that the political check "found lacking in *McCulloch*," *Cty. of Fresno*, 429 U.S. at 463, is alive in West Virginia: Banks cannot vote, but federal workers no less than state and local employees are citizens of the States where they live.

Finally, this is not a margins case. Undoubtedly, there will be difficult cases testing the line between a nondiscriminatory tax scheme and the total exemptions in *Davis* and *Barker*. This, however, a challenge to a statute applying to a dwindling percentage (now 2%, Pet. App. 16a, J.A. 28, 33, 38) of West Virginia's state retirees, is not one of them.

Petitioners argue (at 26) that "[l]imiting *Davis* to only those tax policies that discriminate in favor of *all* state retirees" would lead to "absurd results." Yet this is not the rule the state supreme court applied. Under a functional, purpose-based approach, taking an exemption "away from one unlucky state retiree," or even a narrow subset of state retirees, would not have "cured the violation in *Davis*," Pet. Br. 26; the potential for government interference and lack of sufficient political checks would have been almost as strong as for the *Davis* exemption itself. So too for a scheme of "narrow exemptions for many groups of state retirees" adding "up to something very similar to

an exemption for all state retirees." *Id.* Because Section 111's constitutional purposes are offended whether a state exempts its entire workforce piecemeal or whole cloth, a proper view of Section 111 is able to look beyond a statute's form. See *Jefferson Cty.*, 527 U.S. at 439 (explaining that Section 111 challenges turn on "[t]he practical impact [of the tax], not the State's name tag").

Petitioners' rigid framework is therefore unnecessary to guard against absurdity. Adopting it, in fact, would cause the incongruous result of leaving *no* cases where the immunity doctrine's purposes bear weight. Yet because the doctrine consciously holds in tension "competing constitutional imperatives," the importance of "giving full range to each sovereign's taxing authority" demands a "narrow approach." *New Mexico*, 455 U.S. at 735-36; see also *Murray Corp.*, 355 U.S. at 493 (applying the doctrine with "[d]ue regard for the State's power to tax"). If the historical framework and constitutional rationales Section 111 embodies have any continuing place in tax immunity jurisprudence, then this is the case where they must matter. At a minimum, the Court should be skeptical of an approach that would expand the doctrine anew, in a different form than the first time it exceeded its proper bounds, but one no less "divorced both from the constitutional foundations of the immunity doctrine and from 'the actual workings of our federalism.'" *New Mexico*, 455 U.S. at 731 (quoting *Graves*, 306 U.S. at 490).

B. The Intergovernmental Tax Immunity Doctrine Is Not Violated Under Any Theory Because Mr. Dawson Is Not Similarly Situated To The Exempt State Retirees.

Petitioners' claim would still fail even if an exemption for a discrete and dwindling class of state retirees were the type of discrimination Section 111 bars—that is, if the Court rejects the purpose-based framework and deems intergovernmental tax immunity properly understood in more individual terms. At a minimum, the first step in *Davis*'s test requires petitioners to show that West Virginia treats Mr. Dawson differently than *comparable* state retirees. Yet no federal retirees, much less Mr. Dawson, draw benefits from any of the retirement plans Section 12(c)(6) names. If anything, Mr. Dawson's disconnect from these specialized plans situates him more closely to members of West Virginia's general public retirement plan, PERS—who receive no more than the $2,000 exemption Mr. Dawson may indisputably claim. The Court should reject petitioners' contrary, untethered theory of discrimination, which would require West Virginia to treat Mr. Dawson *better* than his true state counterparts.

1. Although the state supreme court rejected petitioners' claim based primarily (and properly) on the disconnect between Section 12(c)(6) and the purposes of the tax immunity doctrine, it also relied on *Davis*'s teaching that a tax falls only where it affords unequal treatment to "classes" of federal and state employees. *E.g.*, Pet. App. 8a (citing *Davis*, 489 U.S. at 815-16). The court emphasized that Section

12(c)(6) applies to a "very narrow class of former state and local employees," Pet. App. 16a, and Mr. Dawson is not similarly situated to that class.

Indeed, under any reading of Section 111, a state tax that treats similarly situated federal and state retirees the same is not discriminatory. See Pet. Br. 26, U.S. Br. 8, 10, 14, 26. *County of Fresno*, for instance, explained that there is no discrimination threat where "the tax is imposed equally on other similarly situated constituents of the State." 429 U.S. at 462. *Phillips Chemical* stressed that "a State may not single out those who deal with the Government, in one capacity or another, for a tax burden not imposed on others similarly situated." 361 U.S. at 383. *Jefferson County* found the "record show[ed] no discrimination . . . between similarly situated federal and state employees." 527 U.S. at 443. And *Davis* addressed "significant differences" only after finding this threshold step "undisputed." 489 U.S. at 814.

Yet although the rule is easily stated, satisfying the "similarly situated" test is not always simple. Cf. *Ala. Dep't of Rev.* v. *CSX Transp., Inc.*, 135 S. Ct. 1136, 1143 (2015) ("picking a class is easy, but it is not easy to establish that the selected class is 'similarly situated' for purposes of discrimination in taxation" (Railroad Revitalization and Regulatory Reform Act)). At least three principles guide this inquiry.

First, as long as "[t]he class defined is not an arbitrary or invidiously discriminatory one," *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958), identifying similarly situated taxpayers "must focus on the nature of the classification" a challenged tax statute *itself* draws, viewed in context with "the whole

tax structure of the state." *Phillips Chem.*, 361 U.S. at 383; see also Pet. App. 15a (considering "the totality of the structure of West Virginia's tax and retirement scheme").

In *County of Fresno*, for instance, the challenged tax fell on the fair rental value of houses owned by the federal government and supplied to U.S. Forest Service employees as part of their federal compensation. 429 U.S. at 454-55. Even though the forestry employees were required to live in the homes as a condition of employment, *id.*, the particularities of their employment were largely irrelevant to the analysis—because they were not relevant to the distinction the tax code itself drew. *Id.* Instead, the Court deemed the apt comparison class to be "those who work for private employers and rent houses in the private sector," *id.* at 465, and found no intergovernmental tax immunity violation in "a tax on 'the interest which the citizens . . . may hold (in a federal instrumentality) in common with other *property of the same description* throughout the State.'" *Id.* at 463-64 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 436 (emphasis added)).

Where, by contrast, a statute distinguishes on the basis of occupation, a taxpayer's job duties may become relevant. In *Jefferson County* the challenged tax fell on workers who "are not otherwise required to pay a license fee under state law," 527 U.S. at 427, 443-44, and the Court accordingly considered whether the tax discriminated against either "federal judges in particular, or federal officeholders in general." *Id.* at 443.

The United States urges the same view. In a Section 111 challenge, determining "which federal workers or retirees are similarly situated to the state employees receiving more favorable tax treatment will depend *on how the State has defined the favored class*." U.S. Br. 14 (emphasis added). This analysis may require considering aspects of an employee's job, as in *Jefferson County*, but job duties are relevant only to the extent the challenged statute defines the favored class "by reference to employees who perform specific job duties." *Id.* at 14-15. If the statute divides taxpayers on any other grounds, then classes of similarly situated employees must be determined by reference to those bases instead. See *id.* at 15.

Second, the fact that federal employees may never be able to qualify for a particular state tax exemption does not alter this rule. The Court rejected the federal taxpayers' argument in *Jefferson County* that, "as federal judges can never fit within the county's exemption for those who hold licenses under other state or county laws, that exemption unlawfully disfavors them." 527 U.S. at 443. What mattered instead was whether similarly situated state employees paid the tax—that is, those who also did not have a license under state or local laws, including state judges. *Id.* Indeed, as long as the distinction the challenged provision draws is "facially neutral," even a tax "whose burden falls *predominantly* on federal employees is not discriminatory for that reason alone." U.S. Br. 16 n.5 (emphasis added) (citing *Cty. of Fresno*, 429 U.S. at 464).

Third, it is not enough to show kinship with some set of state employees; the federal employee must be

treated differently than the most comparable class of state employees. In the dormant commerce clause context, for instance, "any notion of discrimination assumes a comparison of substantially similar entities," *Gen. Motors Corp.* v. *Tracy*, 519 U.S. 278, 298 (1997), and a court may reject a challenger's proposed comparison class where the entity is in fact more similar to another, *id.* at 300-01 (analyzing *Alaska* v. *Arctic Maid*, 366 U.S. 199, 204 (1961)). Similarly, plaintiffs bear the burden under Title VII[3] to show they received different treatment than similarly situated employees, see, *e.g.*, *Tex. Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 258 (1981), and even when job duties are relevant to this question, they are not sufficient if other factors call into question the strength of a purported comparison, see LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 8.04[2], 8-80 to 8-82 (Rel. 104-4/2018, 2018). Here, these principles mean that petitioners' claim "could properly be rejected" if Mr. Dawson "were demonstrably more comparable to the West Virginia officers who do not receive the state tax exemption than to those who do." U.S. Br. 27-28.

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[3] Because the intergovernmental tax immunity doctrine protect the rights of sovereigns, and the effects of a challenged tax on individual federal employees are a way to measure discrimination against the federal government, the framework from Title VII and other statutes prohibiting individual discrimination are only partially relevant to the Section 111 inquiry. Under any approach, however, petitioners should at least be held to standards similar to those under Title VII for establishing discrimination relative to a similarly situated class of state employees. See Pet. Br. 26; U.S. Br. 27 n.6.

2. Applying this framework demonstrates that West Virginia law treats Mr. Dawson the same as similarly situated state retirees—and thus that there is no discrimination in West Virginia's decision not to extend the Section 12(c)(6) exemption to federal retirees.

It was readily apparent in cases like *Davis* and *Barker* that the challenged statutes treated comparable retirees differently—because those statutes dealt in absolutes. In *Davis*, for instance, the State exempted "*all* retirement benefits" to state and local entities, but taxed "retirement benefits paid by *all* other employers, including the Federal Government." 489 U.S. at 805 (emphases added); see also *Barker*, 503 U.S. at 596 ("The State of Kansas taxes the benefits received from the United States by military retirees but does not tax the benefits received by retired state and local government employees."). Section 12(c)(6) does not make similarly broad distinctions between federal and state retirees, but the analysis is no less plain under that statute's terms.

Rather than referring to broad categories of retirement income, Section 12(c)(6) lists specific state-managed retirement plans: "any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System." W. Va. Code § 11-21-12(c)(6). Critically, it does not name *all* state-managed retirement plans, nor even all plans covering state and local law enforcement retirees.

Missing from Section 12(c)(6) are the Judges' Retirement System, TRS, and PERS—which, in turn, covers county sheriffs, DNR officers, capitol police, and others. Pet. App. 13a-14a. The statute also does not apply to all state and local retirees who might appear to qualify based on their job titles and the names of the listed plans. Deputy sheriffs hired before 1998, for example, are presumptively covered by PERS, as well as many local firefighters and police officers. Pet. App. 13a; J.A. 84, 126.

There is no reason not to take these plan-based distinctions at face value when searching for retired state employees comparable to Mr. Dawson. See *City of Detroit*, 355 U.S. at 473. When read in context with "the whole tax structure of the state," *Phillips Chem.*, 361 U.S. at 383, Section 12(c)(6)'s limited scope makes clear that West Virginia's choice to designate specific state retirement plans was not pretextual or the functional equivalent of a blanket or otherwise broadly applicable tax exemption. *Cf. Hackman* v. *Dir. of Revenue*, 771 S.W.2d 77, 79-82 (Mo. 1989) (striking down exemption scheme scattered throughout state retirement plan statutes that, taken together, had the effect of exempting all state—but no federal—retirees' income). Similarly, the distinctions Section 12(c)(6) draws are not a "cloak for discrimination," *Barker*, 503 U.S. at 605, because there is no suggestion that the statute is applied less than evenhandedly. All retirees drawing benefits from one of the covered plans receive the exemption, and retirees in any other plan—federal, private, *or state*—do not. Cf. *Davis*, 489 U.S. at 817 (explaining that "evenhanded application of the [State's] rationale

would have resulted in inclusion of some [taxpayers who deal with the State] in the disfavored class as well" (citing *Phillips Chem.*, 361 U.S. at 384-85)).

Viewed under the statute's plan-specific terms, Mr. Dawson is not similarly situated to the retirees Section 12(c)(6) exempts.

First, Mr. Dawson—like other federal retirees—does not receive retirement benefits from one of the enumerated state-managed plans. This makes the class of federal retirees similarly situated to those who receive the exemption a null set. But just as in *Jefferson County*, it is irrelevant that Mr. Dawson and other U.S. Marshals could "never fit within the [state] exemption." 527 U.S. at 443. Because other state retirees pay the same tax as their federal counterparts—that is, because the line Section 12(c)(6) draws leaves both federal and state retirees in the disfavored class—then there is no discrimination "between similarly situated federal and state employees." *Id.*

Second, somewhat shifting the angle, Mr. Dawson *is* similarly situated to the state retirees who pay the tax, because PERS—not the plans named in Section 12(c)(6)—is the state-managed plan most similar to Mr. Dawson's federal retirement plan. Mr. Dawson draws an annuity from FERS, the general federal retirement plan for civilians, J.A. 183-84, much like PERS is the general retirement plan for West Virginia public employees, J.A. 44. FERS and PERS are both partially funded by member contributions; both calculate benefits using an average of the member's highest three-year salary; both allow members to opt for survivorship benefits with a corresponding

adjusted monthly annuity; and both allow their members to remain eligible for social security benefits. J.A. 9-11, 28, 46; see also 5 U.S.C. § 8403. And members of both may claim the $2,000 tax exemption under West Virginia Code § 11-21-12(c)(5), but not the larger exemption under Section 12(c)(6). In *Barker*, the fact that "military benefits are determined in a manner very similar to that of the Kansas Public Employee Retirement System" was an important factor supporting this Court's conclusion that members of both plans must receive similar treatment under state tax law. See 503 U.S. at 600. West Virginia tax law already treats FERS and PERS members the same.

3. Petitioners' contrary methods to identify comparable sets of employees fail. At its most extreme, petitioners' theory argues that "as long as *any* state retirees were treated better than federal retirees, the differential treatment might have been based on source of income," and the Court must proceed to the second step in the analysis. Pet. Br. 24 (emphasis in original). As explained above, p. 31, *supra*, this approach cannot account for *Jefferson County*'s holding. It would also eviscerate the similarly situated analysis. This Court's insistence on comparing apples to apples cannot be squared with searching a State's tax codes to find even one state employee who receives more favorable tax treatment than federal employees. See also U.S. Br. 16 n.5 ("Some state tax exemptions will be unproblematic even though they result in particular federal employees receiving less favorable tax treatment than particular state retirees.").

Petitioners' alternate tact—comparing job descriptions of federal and state employees—fares no better. See Pet. Br. 19 (framing the inquiry as whether Mr. Dawson and "other federal *law enforcement* retirees are taxed more heavily than state *law enforcement* retirees" (emphases added)). This approach wrongly assumes that two retirees with similar job duties are *per se* similarly situated, irrespective of the distinctions Section 12(c)(6) itself draws. Indeed, petitioners stumble at the outset, acknowledging that West Virginia exempts state retirees' "income from certain state *plans*," yet alleging discrimination because the State "denies that favorable tax treatment" to federal "law enforcement *retirees*." Pet. Br. 1 (emphases added). Comparing job duties may be an adequate method to classify sets of employees in some cases, but this is not one of them.

Critically, Mr. Dawson's federal job description cannot answer which class of state law enforcement officers he is comparable to—the class that receives the Section 12(c)(6) exemption, or the class that does not. See U.S. Br. 28 (agreeing that petitioners' claim would fail if Mr. Dawson "were demonstrably more comparable to the West Virginia officers who do not receive the state tax exemption than to those who do"). For example, petitioners claim that Section 12(c)(6) applies to "the vast majority of state law enforcement retirees." Pet. Br. 19. Even assuming this statement is correct (and it almost certainly is not—MPFRS applies to only a small number of municipal law enforcement officers, J.A. 28, 33, 38, and the exemption does not cover other entire categories of law enforcement officers, like those employed by DNR,

Pet. App. 13a-14a), petitioners offer no way to tell whether Mr. Dawson is comparable to the majority or minority.

The reality is that West Virginia does not have a general tax exemption for law-enforcement retirees. Section 12(c)(6) looks at specific retirement plans, not categories of jobs—a distinction that matters given the particulars of this claim. Petitioners' job-duties approach has proven supremely malleable; at various points in state court petitioners compared Mr. Dawson's federal position to a state deputy sheriff, state trooper, or law enforcement officer more generally, see, *e.g.*, J.A. 241-42 (OTA appeal), 274-75, 281 (circuit court), J.A. 286-87 (state supreme court), with deputy sheriff the most frequent comparison, see, *e.g.*, J.A. 175-77, 241. Yet although Mr. Dawson began his federal career as a deputy, he retired as a full U.S. Marshal. Under federal law, U.S. Marshals and deputy marshals alike have authority, when "executing the laws of the United States within a State," to "exercise the same powers which a *sheriff* of the State may exercise in executing the laws thereof." 28 U.S.C. § 564 (emphasis added). Throughout litigation, however, petitioners avoided direct comparisons to state sheriffs, who typically do not qualify for the Section 12(c)(6) exemption. J.A. 84; W. Va. Code §§ 5-10-17, 7-14D-24.

To be sure, the circuit court found it undisputed that there were no material differences between Mr. Dawson's duties as a U.S. Marshal and "the powers and duties of the state and local law enforcement officers listed in § 11-21-12(c)(6)," including some deputy sheriffs. Pet. App. 22a. But that is as far as it

went—it did not find that he was *dissimilar* to other, non-exempt state law enforcement officers like county sheriffs. Nor could it have, as sheriffs no less than their deputies have authority to investigate crimes, execute warrants, and make arrests, just as Mr. Dawson testified he did as a U.S. Marshal. See J.A. 174-76.

Further, the same weakness persists looking only at deputy sheriffs as a potential comparison class. Deputy sheriffs hired before July 1, 1998—*like Mr. Dawson*, who was a deputy sheriff before leaving the State's payroll in 1987 to become a deputy U.S. Marshal, J.A. 175, 195—were not automatically enrolled in DSRS, but had to choose to transfer into that plan. J.A. 84; Pet. App. 13a. It is therefore doubtful that Mr. Dawson has more in common with the deputy sheriffs in DSRS than with those who draw benefits from PERS and receive the standard $2,000 exemption.

"Job duties" cannot be the measure of similarly situated state and federal employees; this approach leaves too many open questions. Indeed, it suggests that Mr. Dawson is *more* closely similar to the state law enforcement officers who generally do not receive the Section 12(c)(6) exemption than to those who do.[4]

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[4] The United States notes (at 28) that the Supreme Court of Appeals "did not suggest, or identify any reason to believe, that Mr. Dawson is more similarly situated to" the state law enforcement officers who do not receive the Section 12(c)(6) exemption. The state high court did, however, rely on the fact that only some state law enforcement officers are eligible for the exemption. Pet. App. 13a-14a, 15a-16a. And even under a more taxpayer-friendly standard like Title VII's framework, it is Mr.

A theory incapable of explaining whether Mr. Dawson is more like the state retirees who receive the Section 12(c)(6) exemption or those who (despite performing similar job duties) do not, is a theory unable to clear the gate.

Finally, this Court should reject petitioners' theory because making "job duties" the key factor muddies what should be a straightforward question: If Section 12(c)(6) violates intergovernmental tax immunity, what is the appropriate remedy? The solution for a discriminatory state tax should be evident from the scope of the violation. See U.S. Br. 21 ("if the state exemption is limited to a narrow subset of state retirees, the State can comply with Section 111 by exempting only the comparable class of federal retirees"). And so it would be under an approach tracking the distinctions a challenged provision itself draws. An exemption open to state retirees over 75, for example, can be rescinded or applied evenhandedly to federal retirees over 75. See *id.* at 15. It is far less clear what West Virginia would need to do under petitioners' approach. Would the Tax Commissioner be required to accept claims for total exemptions from every federal law enforcement officer, even though the West Virginia Legislature manifestly did not authorize him to do so for every *state* law enforcement officer? Or if the distinction turns on specific job titles, like "deputy sheriff," is every federal retiree who, like Mr. Dawson, had authority to investigate and make arrests entitled to

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Dawson who bore the burden to establish a proper comparison class. See, *e.g.*, *Burdine*, 450 U.S. at 258.

an exemption that not all state deputy sheriffs can claim? Petitioners stand silent on this critical score.

Under any theory of Section 111, the Court should hold that West Virginia's tax code does not discriminate against federal retirees. Because West Virginia does not treat all state and local law enforcement retirees the same—*even some who held the exact same job*—petitioners have not shown that Mr. Dawson was treated differently than similarly situated state retirees.

II. Any Heavier Burden Section 12(c)(6) Imposes On Federal Retirees Is Justified By Meaningful Differences Between The Classes Of Employees.

If the Court determines that Section 12(c)(6) reflects the type of discrimination with which the intergovernmental tax immunity doctrine is concerned, it should still affirm or (as the United States urges, U.S. Br. 17) remand to the state supreme court. Section 12(c)(6) survives the second step in the Section 111 inquiry because any differential treatment is justified by significant differences between the state retirees eligible for the Section 12(c)(6) exemption and federal retirees, like Mr. Dawson, who are not.

Section 111 does not prohibit all forms of inconsistent treatment between state and federal employees. After all, federal and state tax codes alike are rife with differential treatment, granting separate exemptions and different tax treatment to married taxpayers and those filing individually, homeowners and renters, and government and private-sector employees. Distinctions among taxpayers violate the

tax immunity doctrine only where they are drawn "based on the source of the pay or compensation." 4 U.S.C. § 111(a); *Davis*, 498 U.S. at 813. An essential part of that inquiry, this Court has held, turns on whether the treatment is "justified by significant differences between the two classes." *Phillips Chem.*, 361 U.S. at 383.[5]

Here, significant differences between Mr. Dawson and the state and local retirees eligible for the Section 12(c)(6) exemption are an independent basis to reject petitioners' challenge. Petitioners emphasize the circuit court's finding that it was undisputed there are no material differences between Mr. Dawson's job duties as a U.S. Marshal and the job duties of the state retirees to whom Section 12(c)(6) applies. Pet. Br. 11, 20. Yet the circuit court did not find it undisputed that no *other* meaningful differences exist between the two classes. Pet. App. 22a. The Supreme Court of Appeals, in turn, did not reach this issue, although the parties pressed it at every stage, see, *e.g.*, Pet. App. 4a, 12a-13a. If this Court rejects the state supreme court's holding at the first step of the Section 111 analysis, it should nonetheless affirm or remand at Step 2 on the basis of these "meaningful differences," *Davis*, 489 U.S. at 814; see also *McGoldrick* v.

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[5] Respondent agrees with the United States that the significant differences test helps discern whether discrimination against federal employees "is (impermissibly) 'because of the federal employee's source of pay or (permissibly) because of something else." U.S. Br. 17 (quoting *Davis*, 489 U.S. at 816). Indeed, this additional caveat distinguishes Section 111 from the "categorical" ban on discrimination on which the United States later relies. U.S. Br. 22 (citing Interstate Commerce Act, Pub. L. No. 49-104, ch. 104, Pt. I, § 2, 24 Stat. 379-380 (1887)).

Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940) ("where the constitutionality of a statute has been upheld in the state court, [this Court] consistently refuses to consider any grounds of attack not raised or decided in that court").

"[J]ob duties are not the only potentially relevant difference under Section 111." U.S. Br. 14 (citing *Barker*, 503 U.S. at 598-600). Financial distinctions flowing from the structural aspects of a retirement plan can also constitute significant differences. *Davis*, for instance, left open the possibility of permissible state tax exemptions accounting for "differences in retirement benefits." 489 U.S. at 817. Distinctions between "current income" and "deferred income" may also potentially justify differing tax treatment, otherwise it would have been unnecessary for *Barker* to determine at the significant-differences stage that military and state benefits are both "deferred." 503 U.S. at 599-605. The different treatment against which petitioners chafe—eligibility for Section 12(c)(5)'s $2,000 exemption rather than the larger exemption under Section 12(c)(6)—is justified by financial distinctions like these.

The Tax Commissioner argued in state court that the structure and benefits of the plans Section 12(c)(6) names support treating members of those plans different from other state and federal retirees. Pet. App. 23a-24a; J.A. 196-203, 253-54, 261-62, 287-94; see also *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 90 n.2 (1988) (provided that a claim is asserted in state court, on a federal question "[p]arties are not confined [in this Court] to the same arguments which were advanced in the courts below"). For

instance, unlike the blanket exemption in *Davis* drawn irrelevant to the amount of state employees' retirement income, see 489 U.S. at 817, the state retirees eligible for the more tailored Section 12(c)(6) exemption are either ineligible for social security benefits or otherwise receive lower benefits than retired U.S. Marshals like Mr. Dawson. *E.g.*, J.A. 253-54 (finding that Mr. Dawson received greater benefits than retired deputy sheriffs), 116 (similar for each class of exempted retirees), 219 (explaining that State Troopers are not eligible for social security).

Other structural differences are the contributions retirees covered by the exempted plans made while active employees. The lion's share of West Virginia public employees are members of either PERS or TRS. See J.A. 28 (in 2010, over 98% of state retirees). Active employees enrolled in PERS contribute either 4.5% or 6% of their gross salary to fund that system, J.A. 44-46, and employees enrolled in TRS contribute 6%, J.A. 53, 55-56. The picture is much different, however, for members of the specific retirement plans the state legislature singled out in Section 12(c)(6). These employees contribute significantly higher percentages of their gross salaries to fund their respective retirement plans: MPFRS and DSRS members contribute 8.5%, members of Trooper Plan A 9%, and members of Trooper Plan B 13%. J.A. 69, 77, 85, 101. These higher contribution levels are another "meaningful difference" indicating that Section 12(c)(6) does not discriminate because of the source of retirement income, but based on the specific features of the retirement plans from which that income flows.

Of course, a State must apply financial or structural distinctions like these evenhandedly. *Davis*, 489 U.S. at 817. A permissible finance-based distinction, for example, would be used "as a determinative factor in distinguishing the *state* retirees who receive a total tax exemption from the state retirees who do not." U.S. Br. 19. This is precisely what Section 12(c)(6) does: By making retirement plans the dividing factor, the statute excludes *over 98%* of state retirees, including some law enforcement retirees who held the exact same positions as others who receive the exemption. Mr. Dawson is also part of—and receives tax treatment identical to—this large category of public-sector retirees.

Finally, these plan-based justifications are not just idle distinctions, but factors important enough to satisfy the significant differences test. The "significance" of a purported difference depends on its "impact" on "government operations," not its consequences for individual taxpayers. *Phillips Chem.*, 361 U.S. at 385. Here, the differences justifying Section 12(c)(6) are critical to the State's role as *employer*. Basing tax policy on the relative features of different state-managed retirement plans, as Section 12(c)(6) does, is about management and accounting decisions just as much as tax policy writ large. Some employees paid more into their retirement on the front end in the form of salary contributions, and are now able to exempt more of their retirement income on the back-end as retirees. Rather than reflecting a desire to "reduce[] the State's employment costs at the expense of the federal

government," *Davis*, 489 U.S. at 816 n.4, Section 12(c)(6) is more properly understood as an internal accounting calculus between the State and its employees.

Differences between the exempted plans and other state-managed plans thus provide more than enough reason for West Virginia to treat some of its *own* retirees differently than others. *Cf. Phillips Chem.*, 361 U.S. at 385 (describing States' power to classify its own citizens as "extremely broad," and "limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary"). Viewed through Section 111's lens, the same bases also justify the State's decision not to extend the Section 12(c)(6) exemption to federal retirees like Mr. Dawson—who not only did not pay the higher salary contributions eligible state retirees paid, but contributed to his own, federal plan at rates between 1.3% and 1.8%, significantly lower than even *non-exempt* state and local retirees. See pp. 12-13 & n.2, *supra*.

Indeed, ignoring the differences between the retirement plans Section 12(c)(6) names and Mr. Dawson's federal retirement plan would afford Mr. Dawson significantly better treatment than comparable state employees. Although petitioners compare Mr. Dawson to a retired deputy sheriff, as a federal employee he did not pay into DSRS. Petitioners' theory would allow him to enter a doubly preferred class above every state employee, not paying into the DSRS fund *and* not paying taxes on his benefits after retirement.

The intergovernmental tax immunity doctrine does not require this result. The doctrine's purpose was never "to confer benefits on [federal] employees," *Graves*, 306 U.S. at 483-84, nor to give some taxpayers "a distinct economic preference" over others, or the ability to "escap[e] their fair share of local tax responsibility," *City of Detroit*, 355 U.S. at 474. And while *Davis* requires a State to "treat those who deal with the [federal] Government as well as it treats those with whom it deals itself," 489 U.S. at 815 n.4 (quoting *Phillips Chem.*, 361 U.S. at 385), it does not go so far as to mandate that *all* federal retirees receive the best tax treatment available to *any* state retiree. See *id.* at 823 (Stevens, J., dissenting) ("The intergovernmental immunity doctrine simply does not constitute a most favored nation provision requiring the States to accord federal employees and federal contractors the greatest tax benefits that they give any other group subject to their jurisdiction."). In short, petitioners seek the benefits Section 12(c)(6) offers without shouldering the burdens that it requires—and that the state retirees who receive it already paid.

* * *

West Virginia's choice not to extend the Section 12(c)(6) exemption to retired U.S. Marshals like Mr. Dawson has nothing to do with the U.S. seal stamped on his benefits checks. Section 12(c)(6) accordingly does not discriminate against the United States or its employees, and the intergovernmental tax immunity doctrine is no barrier to its enforcement.

CONCLUSION

The judgment of the West Virginia Supreme Court of Appeals should be affirmed.

Respectfully submitted.

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No. 17-419

IN THE

Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER,
State Tax Commissioner of West Virginia,

Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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INTRODUCTION

The Dawsons' argument relies on three fundamental premises, and the State concedes each of them. First, § 111 provides that a state tax on the pay of a federal employee must not "discriminate against the ... employee because of the source of the pay." 4 U.S.C. § 111(a). Second, to determine whether a state tax scheme violates § 111, this Court applies the two-step framework set forth in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). Third, under *Davis*, a state tax violates § 111 if (1) it imposes "a heavier tax burden on [federal retirees] than is imposed on [state retirees]," and (2) that inconsistent treatment is not "justified by significant differences between the two classes." State Br. 16 (quoting *Davis*, 489 U.S. at 815-16).

Nonetheless, the State's brief contradicts these fundamental premises at every turn.

First, the State argues that § 111 prohibits only state taxes that unduly interfere with the federal government, and that it does not give federal employees an individual right against discrimination. State Br. 17-18, 22-37. But *Davis* rejected this very argument, *see* 489 U.S. at 814-15, and § 111 expressly prohibits "discriminat[ion] against [federal] employee[s]."

Second, the State argues that there is no § 111 violation so long as the discriminatory tax applies to enough voters to impose a "political check" on excessive taxation. State Br. 32-36. But in *Davis*, the dissent made this precise argument, and the Court rejected it. 489 U.S. at 815 n.4.

Third, the State urges that the *first* step of *Davis* requires Dawson to show that he is more comparable in various respects to the exempt state retirees than to other, non-exempt retirees. State Br. 38-51. But *Davis* places the burden on *the State* to show at step *two* that its inconsistent tax treatment is justified by significant differences between the state and federal classes. 489 U.S. at 815-17.

Finally, the State says that its discriminatory tax scheme is justified by differences between federal retirees and the exempt state retirees in the amount of benefits received, participation in social security, and retirement plan contribution rates. State Br. 51-57. But the State's tax scheme draws no such lines. West Virginia law denies Dawson the exemption solely because he is a federal retiree rather than a member of one of the plans described in § 12(c)(6), which are open only to state workers. W. Va. Code § 11-21-12(c)(6). And as *Davis* explained, "[a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits" but "on the basis of the amount of benefits received by individual retirees." 489 U.S. at 817.

The State barely tries to show that its tax scheme does not "discriminate against [federal] employee[s] because of the source of the[ir] pay." 4 U.S.C. § 111(a). Instead, its basic argument is that it has a free pass to discriminate because it is not discriminating in favor of *all* state retirees, but only some of them. The argument is irreconcilable with the law and with common sense, and this Court should reject it.

ARGUMENT

I. THE STATE'S TAX SCHEME TREATS FEDERAL RETIREES WORSE THAN STATE RETIREES BECAUSE OF THE SOURCE OF THEIR PAY.

The State concedes that the first step of the *Davis* test simply asks whether the challenged tax scheme imposes "a heavier tax burden on [federal retirees] than is imposed on [state retirees]." State Br. 16 (quoting *Davis*, 489 U.S. at 815-16). Where a state tax scheme does so, the Court proceeds to the second step. *Id.* Despite its concession, however, the State attempts to rewrite the first step to justify the result below. The attempt fails.

A. Section 111 Prohibits Discrimination Against Federal Retirees, Regardless Of Whether The Discrimination Interferes With Government Operations.

The State's principal argument is that § 111 is intended solely to "protect [the federal government's] operations from undue interference" and "is not an individual right [of federal employees] to avoid less-favorable tax treatment." State Br. 23, 24 (internal quotation marks omitted); *see id.* at 17-18, 22-37. In the State's view, § 111 allows states to discriminate against federal employees based on the federal source of their income, so long as the discriminatory taxation is not so exorbitant as to unduly interfere with the operations of the federal government. *See id.* at 23-24.

The State's inadministrable "government operations" theory is contradicted by the text of § 111 and irreconcilable with this Court's precedents.

1. Section 111 says that a state tax on the pay of a federal officer or employee must not "discriminate *against the officer or employee* because of the source of the pay." 4 U.S.C. § 111(a) (emphasis added). The State argues that this language does not give federal employees "an individual right to avoid less-favorable tax treatment." State Br. 24; *see also id.* at 22 ("Individual employees benefit from this immunity, but Section 111 is not defined by reference to them."). Yet the text makes clear that § 111 *is* defined by reference to individual employees and gives each employee a right to be free from discrimination. The statute prohibits "discriminat[ion] against the [federal] officer or employee"—not just discrimination against the federal government (much less "undue interference" with federal operations).

2. The State casts its government interference theory as an interpretation of the first step of *Davis*. *Id.* at 17. But *Davis*—like § 111 itself—is focused on discrimination against federal employees, not interference with federal operations. The State accepts that the first step asks whether the tax scheme "imposes 'a heavier tax burden on [those who deal with the federal government] than is imposed on [those who deal with the state].'" *Id.* at 16 (quoting *Davis*, 489 U.S. at 815-16). The way to answer that question is to compare how the state tax scheme treats federal retirees to how it treats state retirees. The *Davis* test does not ask whether the state tax scheme causes "undue interference" with the federal "government['s] operations." *Id.* at 23 (quoting *Davis*, 489 U.S. at 814).

Indeed, the State's "undue interference" language comes from a passage of *Davis* that *rejected* the State's precise argument. Michigan argued in *Davis* that "the

purpose of the immunity doctrine is to protect governments and not private entities or individuals," and that "so long as the challenged tax does not interfere with the Federal Government's ability to perform its governmental functions, the constitutional doctrine has not been violated." 489 U.S. at 814. This Court disagreed, explaining that "it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine." *Id.*

3. The State's reading is further refuted by this Court's application of the doctrine in § 111 cases.

Davis never so much as hints that Michigan's decision to exempt its own retired employees from the tax applicable to federal and private-sector retirees caused "undue interference" with federal operations, and there is no reason to suppose that it did. The Court did not discuss, for example, whether Michigan's discriminatory taxation of federal retirees made it more difficult for the federal government to hire employees there, or forced the government to pay its Michigan employees a premium to compensate for the state tax. Indeed, the Court did not even say what tax rates Michigan imposed on federal retirees, much less that those rates were exorbitant enough to threaten federal operations. Rather, consistent with the test it announced, the Court considered only whether Michigan imposed a heavier tax burden on federal retirees than on state retirees. 489 U.S. at 815-16.

Similarly, the Court in *Barker v. Kansas* invalidated a tax scheme that discriminated against federal

military retirees. 503 U.S. 594 (1992). On the State's theory, the Court could not have reached that result without first concluding that the tax unduly interfered with the operations of the U.S. military. Yet *Barker* is silent on that point. *Jefferson County v. Acker* also says nothing about interference with federal operations—rather, it upheld the challenged tax scheme because it taxed federal judges just like state judges, rather than taxing pay from federal sources more than pay from state sources (as in *Davis* and this case). 527 U.S. 423, 442-43 (1999).

The State also says that *Davis* and *Barker* cannot foreclose the State's government operations theory of step one because that step was undisputed in those cases. State Br. 20, 26, 30. But the very fact that those cases treat step one as undisputed actually *undermines* the State's theory, because Michigan and Kansas *did* argue that their tax schemes did not interfere with federal operations. *See* Brief for Appellees, *Davis*, 489 U.S. 803 (No. 87-1020), 1988 WL 1025812, at *47 ("[T]here is nothing in the record to demonstrate undue interference with the one government by imposing on it the tax burdens of the other or to demonstrate that the Michigan Income Tax Act is aimed at or threatens the efficient operation of, the federal government." (internal quotation marks and citation omitted)); *id.* at *43-48; Brief for Respondents, *Barker*, 503 U.S. 594 (No. 91-611), 1992 WL 511872, at *37-39. The Court expressed no disagreement with the factual premises of those arguments. Rather, it rejected their legal premise (which the State would now revive) that "so long as the challenged tax does not interfere with the Federal Government's ability to perform its governmental

functions, the constitutional doctrine has not been violated." *Davis*, 489 U.S. at 814.

While it finds no support in the opinion of the Court, the State's focus on the "political process" as a safeguard against discrimination and on the tax scheme's treatment of private-sector retirees could have been pulled straight from the one-Justice dissent in *Davis*. *Compare id.* at 818-21 (Stevens, J., dissenting), *with* State Br. 18, 32-36. The Court directly rejected this mode of analysis, 489 U.S. at 815 n.4, and should decline the State's invitation to resurrect it. *See also* Pet. Br. 29-30.

4. Finding no support in this Court's § 111 precedents, the State relies on cases that did not concern § 111 or discriminatory taxation. State Br. 22-26. Those cases all upheld *nondiscriminatory* taxes. They do not offer a standard for determining whether a tax is discriminatory. Certainly none of them indicates that even a discriminatory tax should be upheld if it does not unduly interfere with federal operations. And several of the cases say (consistent with § 111 and the case law interpreting it) that a discriminatory tax is ipso facto invalid.[1]

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[1] *See James v. Dravo Contracting Co.*, 302 U.S. 134, 158 (1937) (upholding "nondiscriminatory local taxation"); *Helvering v. Gerhardt*, 304 U.S. 405, 420 (1938) (upholding "nondiscriminatory [federal] tax" on state employees' income); *City of Detroit v. Murray Corp. of Am.*, 355 U.S. 489, 495 (1958) (upholding state tax where "[t]here was no discrimination against the Federal Government ... or those with whom it does business" *and* "no crippling obstruction of any of the Government's functions"); *United States v. New Mexico*, 455 U.S. 720, 735 n.11 (1982) ("state taxes on [federal] contractors are constitutionally invalid if they discriminate against the Federal Government, or

The State places special emphasis on dicta from *Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466 (1939). State Br. 24, 25. *Graves* overruled cases prohibiting even the nondiscriminatory state taxation of federal employees' pay. *See* 306 U.S. at 486-87. As *Davis* explains, § 111 "codified the result in *Graves*" by consenting to such *nondiscriminatory* taxation. *Davis*, 489 U.S. at 812. But *Graves* does not go beyond upholding nondiscriminatory taxes. It does not say that *discriminatory* taxation is ever permissible. That is why *Davis* draws its two-part test not from *Graves* but from *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376 (1960)—which never mentions *Graves*. *See Davis*, 489 U.S. at 815-16. In short, the State's precedents on nondiscriminatory taxation provide no guidance for this case.

5. Finally, the State points to a single sentence from § 111's legislative history. State Br. 25. The same sentence was before the Court in *Davis*. *See* 489 U.S. at 819 n.1 (Stevens, J., dissenting). But "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." *Id.* at 808 n.3 (opinion of the Court). Section 111 unambiguously protects federal employees from discriminatory taxation,

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substantially interfere with its activities," but "New Mexico ... is not discriminating here"); *South Carolina v. Baker*, 485 U.S. 505, 523, 527 (1988) (upholding "a nondiscriminatory federal tax on the interest earned on state bonds" and explaining that "States ... can tax any private parties with whom [the United States] does business ... as long as the tax does not discriminate against the United States or those with whom it deals"); *Cal. State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 848-49 (1989) ("There is no claim ... that the tax discriminates").

regardless of whether the discrimination interferes with federal operations.

B. The State's Tax Scheme Is Discriminatory On Its Face.

The State contends that it is not discriminating against federal retirees by denying them the § 12(c)(6) exemption because "no federal retirees ... draw benefits from any of the retirement plans Section 12(c)(6) names." State Br. 38. But that *is* the discrimination: The State's tax scheme literally "discriminate[s] against" federal law enforcement retirees—and in favor of the State's own retirees—"because of the source of the pay." 4 U.S.C. § 111(a).

First, the exemption is expressly source-based. Income from the § 12(c)(6) plans receives a full exemption, while income from other retirement plans (including federal plans) is taxed. Pet.App.2a-3a. Thus, the tax scheme discriminates "because of the source of the pay." 4 U.S.C. § 111(a).

Second, this source-based discrimination is "discriminat[ion] against [federal] employee[s]." *Id.* The State does not permit federal employees to participate in the § 12(c)(6) plans. Those plans are *state* sources open to *state* employees only. They are run and funded by the State, and the income they provide is compensation for state employment. An exemption that is restricted to income from state sources that are themselves restricted to state employees is inherently an exemption for state employees only. The State's tax scheme thus

"discriminate[s] against" federal employees "because of the [federal] source of the pay." 4 U.S.C. § 111(a).[2]

Indeed, the exemption struck down in *Davis* operated just like § 12(c)(6): It exempted "benefits received from a public retirement system of or created by an act of this state." 489 U.S. at 806 n.2 (quoting Mich. Comp. Laws § 206.30(1)(f)(i) (Supp. 1988)). The West Virginia and Michigan tax schemes are *identical* in the manner in which they discriminate against federal retirees because of the source of their pay. The only difference is that the Michigan law favored *all* state retirement plans whereas § 12(c)(6) discriminates in favor of only *some* state plans. But that distinction does not change the outcome under § 111.

C. The State Is Not Free To Discriminate In Favor Of Its Retirees Simply Because It Does Not Discriminate In Favor Of All Of Them.

The State claims to have found a loophole in § 111 that gives it a free pass to discriminate so long as it does not discriminate in favor of *all* of its workers—that is, so long as it taxes some of its workers as much as it taxes federal workers. That cannot be right.

On the State's theory, step one of *Davis* requires Dawson to show that he is "similarly situated" to the exempt state retirees and, moreover, that he is *more* similar to them than to all non-exempt state retirees. State Br. 38-42. The State says that Dawson is not

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[2] Cases upholding tax classifications that are not "arbitrary or invidiously discriminatory," State Br. 39 (quoting *United States v. City of Detroit*, 355 U.S. 466, 473 (1958)), are therefore inapposite.

similar to the exempt retirees because he is not a member of an exempt state plan. *Id.* at 38, 45. It adds that, even if he is similar to them, he is not *more* similar to them than to all state retirees in non-exempt plans—some of whom are identical to the exempt retirees in all other respects. *Id.* at 38, 45-51. The State's argument implies that, because no federal retiree is eligible for either the favored or the disfavored state plans, it might be *impossible* for Dawson—or any other federal retiree—to establish a § 111 claim, even though the State's tax scheme is facially discriminatory. *See id.* at 51 ("Because West Virginia does not treat all state and local law enforcement retirees the same—*even some who held the exact same job*—petitioners have not shown that Mr. Dawson was treated differently than similarly situated state retirees.").

1. *Davis* offers no such loophole. As the State elsewhere acknowledges, step one merely asks whether the tax scheme "imposes 'a heavier tax burden on [federal retirees] than is imposed on [state retirees].'" *Id.* at 16 (quoting *Davis*, 489 U.S. at 815-16). This step is satisfied where, as in both *Davis* and this case, a state's tax laws exempt pay from state retirement plans while taxing the federal plaintiff's retirement pay with no non-source-related basis in state law for the inconsistent treatment.

There is no doubt that "any notion of discrimination assumes a comparison of substantially similar entities." *Id.* at 42 (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997)). But that comparison is the point of step *two* of *Davis*, which puts the burden on the State to show that "the inconsistent tax treatment is directly related to, and justified by, 'significant

differences between the two classes.'" *Davis*, 489 U.S. at 816 (quoting *Phillips Chemical*, 361 U.S. at 383); *see also id.* at 815-17 (rejecting differences suggested by Michigan); *Barker*, 503 U.S. at 598 (addressing Kansas' "six proffered distinctions"). If step one included a "similarly situated" analysis, then step two would be superfluous.

In *Barker*, where federal military retirees challenged a tax scheme that exempted both state and federal civilian retirees, the Court never considered whether the plaintiffs were "similarly situated" to the favored state retirees. *See* 503 U.S. at 596 n.1. On the State's view, the plaintiffs should have lost at step one, because members of the military are not similar to state workers. But the Court, satisfied that Kansas was indeed imposing a heavier tax burden on the federal plaintiffs than on its own retirees, proceeded to step two. *Id.* at 598-600, 605.

In *Jefferson County*, by contrast, the challenged tax scheme was facially neutral. The classes of taxpayer subject to state licensing requirements, and thus entitled to the county tax exemption, were not defined by reference to state or federal sources of income. *See* 527 U.S. at 458-64 (Breyer, J., dissenting) (listing the exempt classes). As a result, state judges were taxed the same as the federal judges, and "federal employees [we]re at least proportionately represented among the" exempt taxpayers. *Id.* at 442-43 & n.12 (opinion of the Court). The Court accordingly upheld the tax, while warning that "[s]hould ... County authorities take to exempting state officials while leaving federal officials ... subject to the tax, that would indeed present a starkly different case." *Id.* at 443.

The State also seeks support from a Title VII case, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). State Br. 42 & n.3, 49 n.4. But *Burdine* is inapposite, for it did not involve facial discrimination. Rather, it addressed the *McDonnell Douglas* procedure for demonstrating that a discriminatory motive caused an employer's *facially neutral* action. 450 U.S. at 250-56. If *Burdine* had involved facial discrimination like this case—say, if the plaintiff's employer had created a pension plan open only to men and then denied her benefits because she was not a member—then it would have been an open-and-shut case.

2. The State's loophole also relies on its assertion that a § 111 plaintiff has no claim unless the plaintiff is *more* similar to the exempt state retirees than to the non-exempt ones. State Br. 41-42, 48-50. That notion is irreconcilable with this Court's § 111 precedents and with discrimination law in general.

The *Davis* analysis never asks whether the plaintiff is more similar to the exempt state workers than to other, non-exempt state workers. Even at step two, where the State bears the burden, the question is only whether there are significant differences between the federal workers and the *exempt* state workers that justify the inconsistent treatment. *Davis*, 489 U.S. at 816. If the differences between those classes are insignificant, then the State loses. *Id.* at 817; *Phillips Chemical*, 361 U.S. at 386-87. It does not matter whether some *non-exempt* state worker is even *less* different from the plaintiff in some respect.

Consider a comparable hypothetical under Title VII: An employer's official policy gives higher pay to men

with beards longer than four inches. A female worker challenges this facial discrimination. On the State's theory, her inability to show that she is more similar to the favored long-bearded male employees than the short-bearded male employees (who receive no special treatment) would insulate the discriminatory policy from challenge. But no court would hesitate to hold it invalid. The dispositive question is whether the employer is discriminating against the plaintiff *because of her sex*. It is. The policy denies her the pay because she is not a long-bearded man, a clear instance of sex discrimination. The policy *also* denies the pay to short-bearded men, but that is not why it denies the pay *to the plaintiff*, for she is not a short-bearded man. And whether she is more similar to the short-bearded men in *other* ways unconnected to the official criteria is irrelevant to whether this is sex discrimination. Even if she were more similar to the long-bearded men in these other respects, she still would not get the pay, because of her sex. Thus, the employer cannot escape liability for sex discrimination simply because it does not discriminate in favor of *all* men.

The same logic holds here. The state tax scheme denies Dawson the exemption for just one reason: because he is not a member of an exempt state plan. That is a clear instance of source-based discrimination. True, the State also denies the exemption to state retirees in other, non-exempt state plans. But that cannot explain why it denies the exemption to Dawson: His problem is not that he is in the wrong state plan, but that he is a federal retiree and therefore ineligible

for *any* state plan.[3] The State also suggests that Dawson is more like the non-exempt state retirees in *other* ways, and cites the trivial technical details of his federal plan. But these supposed similarities have nothing to do with the line drawn by state law, which makes membership in a favored state plan the sole criterion for the exemption and would thus deny the exemption to members of *any* federal plan, even if that plan's details were identical to those of the exempt state plans.

The State's framework should also be rejected because it would be inadministrable. Answering the metaphysical question of whether a given federal employee is "more similar" to one similar state worker or to another requires a weighing of innumerable attributes of each class. The State's own discussion of the technicalities of the various retirement plans shows that the framework is incoherent. By contrast, the straightforward question of whether the state tax code applies different rules to federal versus state taxpayers is far better suited to judicial determination—and more consistent with the statutory task of determining whether a larger tax burden on a federal employee is "because of the source of the pay." *See also* Pet. Br. 30-32 (discussing the benefits of bright-line rules).

3. The State's argument fails even on its own terms. To support its comparison of Dawson's federal plan (FERS) to one of the non-exempt state plans

[3] The State says that Dawson is like the non-exempt state retirees because they too are not members of the exempt state plans. State Br. 45. But it could just as well be said that he is more like the *exempt* retirees because they too are not members of the *non-exempt* state plans.

(PERS), the State cherry-picks technical details of the plans without discussing whether those details distinguish those plans from the exempt plans or making any attempt to explain *why* those particular details should matter under § 111. State Br. 45-46. They do not matter. Section 12(c)(6) would deny Dawson the exemption regardless of the details of his federal plan, simply because it is a *federal* plan and therefore not one of the exempt state plans. And the details of FERS say nothing about what plan he would be in if he were a state worker; in that counterfactual, he would be ineligible for FERS and its details would be irrelevant. Picking over the details of FERS reveals nothing about whether the State is discriminating against Dawson because of the federal source of his income.

The State also compares Dawson to non-exempt state law enforcement retirees, State Br. 48-49—even though it has already conceded that there are no material differences between Dawson's duties as a U.S. Marshal and "the powers and duties of the state and local law enforcement officers listed in" § 12(c)(6). *Id.* at 48 (quoting Pet.App.22a). This argument, too, fails even on its own terms.

The State first says that Dawson may be more similar to sheriffs (who "typically" do not receive the exemption) than to deputy sheriffs, because federal law gives U.S. Marshals and their deputies "the same powers which a *sheriff* of the State may exercise." *Id.* (quoting 28 U.S.C. § 564). The argument is triply defective. First, West Virginia law empowers deputy sheriffs to "perform and discharge any of the official duties" of a sheriff, W. Va. Code § 6-3-1(a)(4), so a federal officer's authority does not make him *more*

similar to a sheriff than to a deputy sheriff. Second, the State ignores the ways in which sheriffs are *less* similar to federal law enforcement officials than deputy sheriffs are, such as the fact that only sheriffs are elected officials. And third, a sheriff actually *is* eligible to participate in the tax-exempt Deputy Sheriff Retirement System (DSRS) if that sheriff was first a deputy sheriff. W. Va. Code § 7-14D-24. Dawson was previously a deputy sheriff (State Br. 12), so he is more similar to the sheriffs who are eligible for the exemption than to any who are not.

The State also notes that deputy sheriffs hired before DSRS was created in 1998 were given the choice of whether or not to transfer to DSRS and obtain the exemption. State Br. 49. But the point is that they were all *offered* that opportunity, whereas Dawson and other federal employees were not. Even if some state workers fail to take advantage of a discriminatory exemption that is offered to them, it is still a discriminatory exemption. In any case, the State has offered no reason to doubt that Dawson would have transferred to DSRS if he had still been a deputy sheriff in 1998.[4]

II. THE DISCRIMINATORY TAX SCHEME IS NOT JUSTIFIED BY SIGNIFICANT DIFFERENCES BETWEEN THE CLASSES.

The second step of the *Davis* test requires the State to show that its inconsistent taxation of state and

[4] The State's argument about remedies, State Br. 50-51, misconceives the scope of this litigation. The Dawsons are the only plaintiffs in this case, and issues that could be raised by other, hypothetical lawsuits are not before this Court. The remedy that the Dawsons seek is simply to be treated like the state retirees who benefit from source-based discrimination.

federal retirees is justified by significant differences between the classes. 489 U.S. at 815-17. The State cannot do so, because the differences it proposes are irreconcilable with the line actually drawn by § 12(c)(6), inconsistent with the State's tax scheme taken as a whole, and too insignificant to justify discrimination against federal employees.

1. The State contends that its discrimination is justified because its exempt retirees differ from federal retirees in total benefits received, eligibility for social security, and the contribution rates required by their retirement plans. State Br. 53-55. But the State's laws do not determine eligibility for the exemption by reference to those factors. Rather, eligibility turns solely on whether the taxpayer is a member of one of the state plans described by § 12(c)(6). And a state cannot justify a facially discriminatory tax scheme by pointing to differences unrelated to the criteria that it actually uses to determine who is exempt.

In *Phillips Chemical*, Texas attempted to justify its discriminatory taxation of lessees of federal land on the ground that the federal land was different from land leased by Texas itself in terms of "size, value, or number of employees involved." 361 U.S. at 384. The Court rejected the argument because "the classification erected by [Texas law] is not based on such factors" but on the identity of the lessor. *Id.*

Similarly, in *Davis*, Michigan pointed to the difference in the retirement benefits received by state versus federal employees, asserting that state retirees' benefits were "significantly less munificent than those offered by the Federal Government." 489 U.S. at 816.

The Court rejected this rationale as inconsistent with the line actually drawn by Michigan law:

> A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees.

Id. at 817. The same is true here: If the State truly intended to account for differences in retirement benefits, social security eligibility, or contribution rates, then § 12(c)(6) would discriminate by reference to those attributes.

2. A closer look at the whole of the State's tax scheme makes clear that differences in retirement benefits, social security eligibility, and contribution rates do not account for who receives the exemption.

The State argues that the "lower benefits" received by state retirees in the exempt plans justify discrimination against federal retirees. State Br. 54. But many exempt state retirees in fact receive higher benefits than federal retirees—including Dawson.[5] *See Davis*, 489 U.S. at 817 (making the same point). For example, the average monthly benefit for newly retired members of Trooper Plan A, which is covered by § 12(c)(6), was $5,534 in 2010. J.A. 112. Dawson's monthly benefit that year was just $4,852. J.A. 204.

[5] At times, the State compares its exempt retirees to Dawson in particular rather than federal law enforcement retirees as a class. State Br. 54, 56. Under *Davis*, however, the question is whether the State's inconsistent tax treatment is "directly related to, and justified by, 'significant differences between the *two classes*.'" 489 U.S. at 816 (quoting *Phillips Chemical*, 361 U.S. at 383) (emphasis added).

And new retirees in the State's non-exempt PERS plan received only $1,485 on average that year, further confirming that § 12(c)(6) is not about providing a tax exemption to retirees with lower benefits. J.A. 112.

The State's argument that state retirees' ineligibility for social security justifies its discrimination fares no better. State Br. 54. The State neglects to mention that DSRS retirees, who receive the § 12(c)(6) exemption, *are* eligible for social security. J.A. 33, 38; Pet.App.23a n.2. In any event, ineligible state retirees saved money by not paying into social security in the first place, so their ineligibility does not justify giving them a discriminatory exemption on top of those savings.

Finally, the State argues that the exempt state plans' higher contribution rates—for instance, 8.5% for DSRS—justify discriminatory taxation. State Br. 54, 56. The argument is incoherent even in theory: If a higher contribution rate is linked to higher retirement benefits, then those higher benefits compensate the retiree for the higher rate, and giving him the further compensation of a discriminatory exemption is unjustified. And if the higher contribution rate is *not* linked to higher benefits, then from the worker's perspective his pay has been cut. The State suggests that the exemption is justified because it compensates for this lower pay, but *Davis* squarely rejects the notion that a state may give its workers a discriminatory exemption in lieu of giving them a pay raise. 489 U.S. at 815 n.4; *see* Pet. Br. 28.

Even if it made theoretical sense, the State's contribution rate argument would fail on the facts. The State does not extend the exemption to other state

plans with the same or higher rates, which shows that its tax scheme has nothing to do with giving a special exemption to retirees who paid the highest contribution rates. J.A. 63, 93 (giving contribution rates of 10.5% for JRS and 8.5% for EMSRS). The State itself acknowledges that it "must apply financial or structural distinctions [between plans] evenhandedly." State Br. 55 (citing *Davis*, 489 U.S. at 817). And it concedes that a "permissible" distinction would distinguish "the *state* retirees who receive a total tax exemption from the state retirees who do not." *Id.* (citing U.S. Br. 19). The State's own concessions thus demonstrate that its proffered "meaningful" differences were in fact contrived post hoc for this litigation. *See also* U.S. Br. 15.

3. The supposed differences that the State has cherry-picked are not "significant" enough to "justify" its discrimination. *See Davis*, 489 U.S. at 815-17. The State's argument is that the exemption promotes "an internal accounting calculus between the State and its employees." State Br. 56. That may be convenient for the State, but "[t]he State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment." *Davis*, 489 U.S. at 816; *see also Phillips Chemical*, 361 U.S. at 383-84. Perhaps the State's "internal accounting calculus" justifies the compensation bundles (salaries, contribution rates, retirement benefits, and taxation) that it gives to *its own* workers. State Br. 56. But it cannot justify tax discrimination against *federal* employees like Dawson, who do not receive compensation from the State. The State has not carried its burden of showing that its "inconsistent tax

treatment is directly related to, and justified by, 'significant differences between the two classes.'" *Davis*, 489 U.S. at 816 (quoting *Phillips Chemical*, 361 U.S. at 383).

Nor could it. The three differences that the State points to boil down to how much money goes into its workers' pockets. At the end of the day, the State's argument is simply that the exempt workers have less favorable compensation packages (which include salaries, contribution requirements, social security eligibility, and retirement benefits) than federal workers do. State Br. 56. As discussed above, the assertion is factually suspect. But even if it were accurate, it would not justify sourced-based discrimination. *Davis* recognized that differences in the amount of benefits cannot justify such discrimination. 489 U.S. at 817. The same logic applies equally to other differences in the classes' compensation packages.

After all, § 111 does not authorize states to pursue income equality for federal workers relative to state workers through taxes that discriminate based on the source of the income. Even if federal workers receive more generous compensation, states have no license to expropriate that federal generosity in order to equalize it with state compensation. If more generous compensation packages for federal workers constituted "significant differences between the two classes" that could "justify" a tax scheme that discriminates based on the source of the income rather than the amount of each individual worker's compensation, then the clear prohibition of § 111 would be practically annihilated.

The Dawsons request only what § 111 promises: that the State "treat [them] ... as well as it treats those with whom it deals itself." *Phillips Chemical*, 361 U.S. at 385.

CONCLUSION

The judgment of the Supreme Court of Appeals of West Virginia should be reversed.

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No. 17-419

In the Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER, AS STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

On May 15, 2018, the Solicitor General filed a brief in response to this Court's invitation to express the views of the United States. Respondent respectfully submits this supplemental brief in response.

ARGUMENT

For the reasons set forth in the Brief in Opposition, Respondent disagrees that the West Virginia Supreme Court of Appeals "misapplied the doctrine of intergovernmental tax immunity." U.S. Br. 6. The United States does not dispute that in the almost thirty years since this Court's decision in *Davis* v. *Michigan Department of the Treasury*, 489 U.S. 803 (1989), no lower court has invalidated a narrow tax exemption such as the one at issue here—where eligibility turns on the particular retirement plans in which certain state law-enforcement retirees are enrolled, and all-told the exemption applies to less than 2% of the state's retired workforce. Pet. App. 13a, 16a. *Davis* does not require such a result, and to hold otherwise would depart from this Court's "narrow approach to intergovernmental tax immunity" by "extend[ing] the doctrine beyond the tight limits this Court has set." *Jefferson Cnty.* v. *Acker*, 527 U.S. 423, 436-37 (1999).

Nevertheless, review would not be warranted even if the court below had misapplied the doctrine of

intergovernmental tax immunity. The United States acknowledges that deciding whether the case is a worthy candidate for review "presents a closer question," yet believes the case offers "a better vehicle" than similar petitions this Court has denied. U.S. Br. 6-7. This view is based on a misperception of the record. When corrected, the "closer question" shifts in favor of denial.

The United States argues this case presents a clean vehicle because the circuit court "found it 'undisputed . . . that there are no significant differences between Mr. Dawson's powers and duties as a U.S. Marshal and the powers and duties of the state and local law enforcement officers' who receive the full exemption [under W. Va. Code § 11-21-12(c)(6)]," and the Supreme Court of Appeals "did not analyze that question." U.S. Br. 19 (quoting Pet. App. 22a.). The circuit court, however, found only that there were no significant differences between the job duties involved in Mr. Dawson's federal position and some of the state law enforcement positions eligible for the Section 12(c)(6) exemption—not that there were no *other* differences that may be relevant to *Davis*'s "significant differences" inquiry. 489 U.S. at 816.

The incomplete, limited nature of the circuit court's holding matters, because under West Virginia law job duties are only one facet of whether a

particular retiree qualifies for the exemption. In other words, the brief of the United States relies heavily on the circuit court's finding that Mr. Dawson's job duties were similar to those of the state law-enforcement retirees who receive the Section 12(c)(6) exemption, but it ignores the fact that not *all* state law-enforcement officers qualify. For example, Mr. Dawson frequently compared himself to retired West Virginia deputy sheriffs. *See, e.g.*, SCA Resp. Br. 16. Yet although many retired deputy sheriffs receive the Section 12(c)(6) exemption, others receive the standard $2,000 exemption available to all state retirees—and to Mr. Dawson. Pet. App. 13a. The difference turns on the specific retirement plan from which any particular retired deputy sheriff draws benefits. *Ibid.* Not all retired state law-enforcement officers receive the Section 12(c)(6) exemption, and the state courts did not resolve whether there are other significant differences between Mr. Dawson and the state retirees with whom he seeks to be compared. The circuit court's finding about job duties generally thus cannot answer whether Mr. Dawson is "similarly situated" to the small subset of state retirees who qualify for the Section 12(c)(6) exemption, or rather if he is similarly situated to those who—despite also retiring from positions involving law-enforcement duties—do not.

As a result, this case is much like *Brown* v. *Mierke*, 443 S.E.2d 462 (W. Va. 1994), where this Court denied

certiorari, 513 U.S. 877 (1994). The United States acknowledges that *Brown* was a weak vehicle for review because it was "unclear whether th[e] plaintiffs were similarly situated to any state retirees who received more favorable tax treatment." U.S. Br. 18. The same is true here.

Finally, the issue presented in the Petition does not, as the United States argues, involve "sufficient legal and practical importance to warrant the Court's review." U.S. Br. 7. With considerable understatement, the United States recognizes that "intergovernmental-tax-immunity issues have not arisen with great frequency." U.S. Br. 6-7. The cases the United States (like Petitioner) cite as purported evidence of division in state courts of last resort date from 1992 to 1996. When these cases arose over twenty years ago, this Court denied three petitions raising similar questions. U.S. Br. 7 & n.4. One of those denials was the petition concerning *Brown*—in which the West Virginia Supreme Court of Appeals analyzed the same state tax regime and reached the same conclusion. There is no reason to depart from that course now. Indeed, the Section 12(c)(6) exemption now applies to an even smaller percentage of state retirees than when *Brown* was decided, even though it has been extended to include some deputy sheriffs. Pet. App. 16a. And nationwide, the trend has been toward extending identical tax treatment to state and federal retirement income. *See* NAT'L

CONFERENCE OF STATE LEGISLATURES, STATE PERSONAL INCOME TAXES ON PENSIONS AND RETIREMENT INCOME: TAX YEAR 2014, at 2 (Apr. 3, 2015). The extremely narrow implications of the decision below do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 17-419

In the Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON, PETITIONERS

v.

DALE W. STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. 111, prohibits the State of West Virginia from exempting from state taxation the retirement benefits of certain former state law-enforcement officers, without providing the same exemption for the retirement benefits of former employees of the United States Marshals Service.

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v.

DALE W. STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether the doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. 111, prohibits the State of West Virginia from exempting from taxation the retirement benefits of certain former state law-enforcement officers, without allowing the same exemption for the retirement benefits of former officers of the United States Marshals Service. The United States has a substantial interest in ensuring that its employees and retirees receive equitable tax treatment from the States. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. In *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court held that the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, barred the State of Maryland

from taxing the Bank of the United States while exempting from taxation banks chartered by the State. 17 U.S. (4 Wheat.) at 320, 436. Chief Justice Marshall concluded that permitting a State to apply such a tax to a federal entity would threaten "clashing sovereignty" and "interfer[ence]" with the federal government's functions. *Id.* at 430.

"For a time, *McCulloch* was read broadly to bar most taxation by one sovereign of the employees of another," on the theory that "any tax on income a party received under a contract with the government was a tax 'on' the contract and thus a tax on the government because it burdened the government's power to enter the contract." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 810-811 (1989) (citation omitted). By the late 1930s, however, "the Court began to turn away from its more expansive applications of the immunity doctrine," holding instead that "intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt." *Id.* at 811 (citing *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938), and *Graves* v. *New York*, 306 U.S. 466 (1939)). The Court explained in 1939 that, when a State's tax is "nondiscriminatory," the application of that tax to employees of the federal government will not result in the sort of intergovernmental strife or "undue interference" with federal operations that the Constitution forbids. *Graves*, 306 U.S. at 484-486; cf. *Gerhardt*, 304 U.S. at 420 (holding that the federal government may impose a nondiscriminatory income tax on employees of the States). See also *South Carolina* v. *Baker*, 485 U.S. 505, 526 n.15 (1988) ("[W]here a government imposes a nondiscriminatory tax, * * * the threat of destroying another

government can be realized only if the taxing government is willing to impose taxes that will also destroy itself or its constituents.").

"[C]ongressional action coincided" with that shift in the Court's constitutional jurisprudence. *Jefferson Cnty.* v. *Acker*, 527 U.S. 423, 437 (1999); see *ibid.* (holding that intergovernmental tax immunity is an area "over which Congress is the principal superintendent"). When "Congress decided to extend the federal income tax to state and local government employees," it also determined "that federal employees would not remain immune from state taxation" so long as any state taxation of federal employees was nondiscriminatory. *Davis*, 489 U.S. at 811-812. To achieve that goal, Congress enacted Section 4 of the Public Salary Tax Act of 1939, ch. 59, 53 Stat. 575, the predecessor to 4 U.S.C. 111. Today (as at all times relevant to this case) that provision states:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, * * * by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

4 U.S.C. 111(a).

This Court has understood the United States' "retention of immunity" in Section 111's last clause to be "coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." *Davis*, 489 U.S. at

813.[1] Under that interpretation of Section 111, a State unlawfully "discriminate[s]" against a federal employee "because of" his source of income, 4 U.S.C. 111(a), when the State "'impos[es] a heavier tax burden'" on the federal employee than on comparable state workers, and when that disparate treatment is not "directly related to, and justified by, 'significant differences between the two classes.'" 489 U.S. at 815-816 (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)); see *Barker* v. *Kansas*, 503 U.S. 594, 596, 598 (1992).

2. West Virginia provides a total exemption from state income taxation for benefits from four state-employee retirement plans: (1) the Municipal Police Officer and Firefighter Retirement System (MPFRS); (2) the Deputy Sheriff Retirement System (DSRS); (3) the State Police Death, Disability and Retirement Fund (Trooper Plan A); and (4) the West Virginia State Police Retirement System (Trooper Plan B). W. Va. Code Ann. § 11-21-12(c)(6) (LexisNexis 2017) (Section 12(c)(6)). Most other state retirees, and all federal non-military retirees (including retired federal law-enforcement officers), receive a less generous exemption. Those taxpayers may exempt from taxation the first $2000 in benefits received each year under the West Virginia Public Employees Retirement System (PERS), the West Virginia State Teachers Retirement System, or "any federal retirement system to which Title 4 U.S.C. § 111 applies." *Id.* § 11-21-12(c)(5) (LexisNexis 2017). See generally Pet. App. 2a-4a.[2]

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[1] This brief therefore refers to the constitutional and statutory nondiscrimination requirements interchangeably. See Pet. 8 n.2; Br. in Opp. 5 n.1.

[2] Respondent, the West Virginia State Tax Commissioner, has identified three classes of former state law-enforcement officers

West Virginia generally does not exempt from state income taxation benefits received under the State's Emergency Medical Services Retirement System or its Judges' Retirement System. W. Va. Code Ann. §§ 11-21-12(c) (LexisNexis 2017); *id.* §§ 16-5V-4, 51-9-1 (LexisNexis 2016); Pet. App. 13a-15a & nn.8 and 11. At all relevant times, West Virginia has exempted a taxpayer's "first [$20,000] of military retirement income," *i.e.*, "retirement income from the regular armed forces, reserves and National Guard." W. Va. Code Ann. § 11-21-12(c)(7)(B) (LexisNexis 2017); Pet. App. 3a.[3] And West Virginia exempts from taxation $8000 of income "received from any source" by individuals who are age 65 or older, or who are "permanently and totally disabled." W. Va. Code Ann. § 11-21-12(c)(8) (LexisNexis 2017). See generally Pet. App. 2a-4a.

3. In 2008, petitioner James Dawson retired from the United States Marshals Service. Pet. App. 4a. Mr. Dawson had served for most of his career as a deputy U.S. Marshal before the President appointed him as the U.S. Marshal for the Southern District of West Virginia. *Ibid.* During his tenure with the Marshals Service, Mr. Dawson was enrolled exclusively in the Federal Employees Retirement System (FERS), and he currently receives benefits from FERS. *Ibid.* Under

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who are not entitled to the unlimited exemption in Section 12(c)(6). Those include certain deputy sheriffs (those who began to work before DSRS was created in 1998 and who elected to keep their pensions with PERS), officers employed by the Department of Natural Resources, and Capitol Police officers. Pet. App. 13a-14a. The record does not disclose the total percentage of West Virginia law-enforcement officers who are entitled to the exemption.

[3] For taxable years beginning after December 31, 2017, West Virginia exempts from state income taxation all military retirement income. W. Va. Code Ann. § 11-21-12(c)(7)(C) (LexisNexis Supp. 2018).

West Virginia law, Mr. Dawson may exempt $2000 of his FERS benefits from his state taxable income. W. Va. Code Ann. § 11-21-12(c)(5) (LexisNexis 2017); Pet. App. 4a. When he turns 65, he will be able to exempt $8000. Pet. App. 4a.

In October 2013, Mr. Dawson and his wife, petitioner Elaine Dawson, filed amended tax returns for 2010 and 2011. Pet. App. 4a; see Pet. 3. Petitioners claimed an adjustment exempting all of Mr. Dawson's FERS retirement income from state taxation pursuant to Section 12(c)(6), the provision that fully exempts state retirement benefits paid under MPFRS, DSRS, Trooper Plan A, and Trooper Plan B. *Ibid.* Respondent disallowed the exemption, Pet. App. 4a, and the West Virginia Office of Tax Appeals denied petitioners' appeal, *id.* at 4a-5a.

4. The Circuit Court of Mercer County reversed, holding that petitioners had been subjected to unlawful discrimination. Pet. App. 17a-25a. The court relied on this Court's holding in *Davis* that 4 U.S.C. 111 requires any imposition of a heavier tax burden on federal employees than on comparable state employees to be "justified by significant differences between the two classes." Pet. App. 20a-21a (quoting 489 U.S. at 815-816). The circuit court acknowledged the holding of the West Virginia Supreme Court of Appeals in *Brown* v. *Mierke*, 443 S.E.2d 462, cert. denied, 513 U.S. 877 (1994), that federal military retirees were not entitled to claim the unlimited state-tax exemption in Section 12(c)(6). Pet. App. 21a. The circuit court found *Brown* distinguishable, however, because the federal military retirees who had sought the unlimited exemption in that case "did not have a state counterpart." *Ibid.*; see *id.* at 23a.

Here, by contrast, the circuit court found it "undisputed * * * that there are no significant differences

between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers" who receive the full tax exemption. Pet. App. 22a. The court concluded that Section 12(c)(6) imposes "inconsistent tax treatment * * * based on the source of one's retirement income," in violation of 4 U.S.C. 111. Pet. App. 23a. The court rejected respondent's contention that Section 12(c)(6) was consistent with federal law because it was meant "to benefit [a] narrow class of *state* law enforcement officers." *Ibid.* The court found that rationale to be "precisely the type of favoritism the doctrine of intergovernmental tax immunity prohibits." *Ibid.*

5. The West Virginia Supreme Court of Appeals reversed. Pet. App. 1a-16a. The court did not dispute the circuit court's finding "that there are no significant differences between the powers and duties of state and local law enforcement officers and those of federal marshals." *Id.* at 12a. Nevertheless, the state supreme court read its opinion in *Brown* to mean that a state tax statute complies with 4 U.S.C. 111 so long as "there is no intent in the [state] scheme to discriminate *against* federal retirees." Pet. App. 10a (quoting 443 S.E.2d at 466).

The state supreme court observed that Mr. Dawson had "received more favorable tax treatment than state civilian retirees" and certain state judges, and had received "the same tax treatment as the * * * vast majority of all state retirees," who also may exempt $2000 of retirement benefits from their taxable income. Pet. App. 14a-15a. The court further explained that "only some law enforcement officers * * * are permitted to rely upon the Section 12(c)(6) exemption," and the exemption covers only "two percent of all state-pension recipi-

ents." *Id.* at 15a-16a. Based on the "totality of the circumstances," the court concluded that Section 12(c)(6) "was not intended to discriminate against former federal marshals," but instead was "inten[ded] * * * to give a benefit to a narrow class of state retirees." *Id.* at 14a-16a.

SUMMARY OF ARGUMENT

The West Virginia Supreme Court of Appeals misapplied the doctrine of intergovernmental tax immunity that is codified in 4 U.S.C. 111.

A. Section 111 permits a State to tax the income of federal employees or retirees only so long as the State "does not discriminate against the [federal] officer or employee because of the source of the pay or compensation." 4 U.S.C. 111(a). A State violates that nondiscrimination requirement when it imposes more burdensome taxation on those who deal with the federal government (including federal retirees), because of their federal status, than on similarly situated persons who deal with the State. In a variety of contexts, both before and after Section 111 was enacted in 1939, this Court has held that a State may not accord more favorable tax treatment to persons with whom it deals than to persons who have comparable relationships with the federal government.

B. West Virginia's Section 12(c)(6) exempts from state taxation the retirement benefits of participants in four retirement plans that serve state and local law-enforcement officers. That state-law exemption does not apply, however, to any federal law-enforcement officer's retirement benefits. The courts below did not identify any significant difference between Mr. Dawson and the retired state law-enforcement officers who

receive the exemption. In the absence of such a showing, West Virginia's inconsistent treatment violates Section 111 by "discriminat[ing]" against Mr. Dawson "because of" the federal source of his pay. 4 U.S.C. 111(a).

C. Rather than determine whether significant differences exist between Mr. Dawson and the state retirees who receive the total state-tax exemption, the state supreme court applied a "totality of the circumstances" analysis. The court concluded that Section 12(c)(6) is permissible because the State intends to favor its own employees but does not intend to disadvantage federal employees; because the State gives preferential treatment to only a narrow class of state retirees; and because Mr. Dawson is treated the same as or better than other classes of state and private employees in West Virginia. Because those rationales for rejecting Mr. Dawson's claim do not speak to whether Mr. Dawson has suffered "discriminat[ion] * * * because of" the federal source of his pay, 4 U.S.C. 111(a), they cannot be reconciled with the text of Section 111 or with this Court's intergovernmental-tax-immunity precedents.

ARGUMENT

WEST VIRGINIA MAY NOT TAX RETIREMENT BENEFITS OF FEDERAL LAW-ENFORCEMENT OFFICERS MORE HEAVILY THAN IT TAXES RETIREMENT BENEFITS OF COMPARABLE STATE LAW-ENFORCEMENT OFFICERS

The doctrine of intergovernmental tax immunity, now codified in 4 U.S.C. 111, permits a State to tax the income (including the retirement benefits) of federal employees so long as the State "does not discriminate against the [federal] officer or employee because of the source of the pay or compensation." 4 U.S.C. 111(a); see *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 808-809 (1989). Construing Section 111 in *Davis*, this

Court held that a State unlawfully "discriminate[s] against" a federal employee "because of" his federal source of pay, 4 U.S.C. 111(a), when the State taxes the federal employee more heavily than comparable state employees, and the inconsistent treatment is not "directly related to, and justified by, 'significant differences between the two classes.'" 489 U.S. at 816 (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)); see *Barker* v. *Kansas*, 503 U.S. 594, 596, 598 (1992).

West Virginia taxes Mr. Dawson's federal retirement benefits more heavily than it taxes benefits for certain state law-enforcement officers whom Mr. Dawson alleges are similarly situated. The West Virginia Supreme Court of Appeals did not dispute the circuit court's finding that "no significant differences" exist between the duties that Mr. Dawson performed as a U.S. Marshal and the duties performed by the state and local law-enforcement officers who receive the full tax exemption. Pet. App. 22a. The state supreme court nevertheless held that West Virginia's taxing scheme does not violate Section 111 because it treats Mr. Dawson as well as or better than most state and private retirees. *Id.* at 14a-16a. That view is contrary to the text of Section 111 and inconsistent with the reasoning of this Court's intergovernmental-tax-immunity decisions.

A. Section 111 Prohibits A State From Subjecting Federal Employees To Heavier Taxation Than Similarly Situated State Employees

1. This Court in *Davis* held that a federal employee suffers unlawful "discriminat[ion] * * * because of" the source of his compensation, in violation of 4 U.S.C. 111(a), when state law subjects him to heavier taxation than similarly situated state employees. 489 U.S. at

816; see *Phillips Chemical*, 361 U.S. at 383 (stating that, in applying principles of intergovernmental tax immunity, it is "necessary to determine how other taxpayers similarly situated are treated"). Any "'imposition of a heavier tax burden on [those who deal with the federal government] than is imposed on [those who deal with the State] must be'" "directly related to, and justified by, 'significant differences between the two classes.'" *Davis*, 489 U.S. at 815-816 (quoting *Phillips Chemical*, 361 U.S. at 383).

The determination whether a tax "discriminate[s]" in violation of Section 111 does not turn on the same "mode of analysis developed in [the Court's] equal protection cases." *Davis*, 489 U.S. at 816. When a State legislates concerning economic matters unrelated to the activities of the federal government, its "power to classify is * * * extremely broad, and [the State's] discretion is limited only by constitutional rights and by the doctrine that a classification may not be" arbitrary. *Phillips Chemical*, 361 U.S. at 385. But when a State taxes federal employees, Congress has enacted—and the Constitution demands—a much stronger mandate of equal treatment. That nondiscrimination rule "require[s] that the State treat those who deal with the [Federal] Government as well as it treats those with whom it deals itself." *Davis*, 489 U.S. at 815 n.4 (quoting *Phillips Chemical*, 361 U.S. at 385). Applying that rule in *Davis*, this Court struck down a Michigan statute that exempted from taxation the retirement benefits of all former state employees while taxing the retirement benefits paid by "all other employers, including the Federal Government." *Id.* at 805; see *id.* at 816-817.

2. The *Davis* Court's description of Section 111 accords with this Court's precedents applying constitutional principles of intergovernmental tax immunity. Congress "consciously" drafted Section 111 "against the background of," and "drew upon," the nondiscrimination requirement that the Constitution imposes on the States. *Davis*, 489 U.S. at 813. Shortly before Congress enacted the original version of Section 111 in 1939, the Court upheld against constitutional challenge two income-tax statutes—one state and one federal—on the ground that they drew no distinction between income received from state and federal employers. See *Graves* v. *New York*, 306 U.S. 466, 480 (1939) (describing New York's tax as one "applied to salaries at a specified rate"); *Helvering* v. *Gerhardt*, 304 U.S. 405, 420 (1938) (federal tax was "laid on [state employees'] net income, in common with that of all other members of the community").

The Court has since adhered to its view that the States may not give more favorable tax treatment to persons with whom they deal than to those who have similar relationships with the federal government. In *Phillips Chemical*, for example, the Court struck down a Texas tax that "impose[d] a distinctly lesser burden on similarly situated lessees of * * * property owned by the State and its political subdivisions" than on lessees of property owned by the federal government or by private parties. 361 U.S. at 379; see *id.* at 381, 387. In *Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392 (1983), the Court applied 31 U.S.C. 742 (1976) (currently 31 U.S.C. 3124)—which establishes a nondiscrimination requirement similar to Section 111—and struck down a Tennessee bank tax that applied to "income from federal obligations while excluding income from otherwise

comparable state and local obligations." 459 U.S. at 398; cf. *Werner Mach. Co.* v. *Director of Div. of Taxation*, 350 U.S. 492, 493-494 (1956) (per curiam) (rejecting a constitutional challenge to the imposition of New Jersey's franchise tax on the value of federal bonds held by a corporate taxpayer, on the ground that the tax "remain[ed] the same whatever the character of the corporate assets may be").

Since *Davis*, this Court has continued to require that state taxing schemes treat federal employees no worse than state workers. In *Barker* v. *Kansas*, the Court struck down a Kansas tax statute that exempted benefits paid to retired state and local employees but taxed federal retirees' benefits, including benefits received by military retirees. 503 U.S. at 596, 605. The Court explained that, "[f]or purposes of 4 U.S.C. § 111, military retirement benefits are to be considered deferred pay for past services," and "[i]n this respect they are not significantly different from the benefits paid to Kansas state and local government retirees." *Id.* at 605.

In *Jefferson County* v. *Acker*, 527 U.S. 423 (1999), by contrast, the Court held that a county's occupational tax, which exempted persons who were subject to another state or county license fee, did not violate Section 111. *Id.* at 429, 442-443. Federal judges sitting in the county argued that the tax discriminated against them because they could never hold other state or local licenses. *Id.* at 443. The Court rejected that contention, explaining that there was "no discrimination * * * between similarly situated federal and state employees" because "[t]he tax is paid by all State District and Circuit Court judges in Jefferson County and the three State Supreme Court justices who have satellite offices

in the county." *Ibid.*[4] The Court observed that, if the State or county adopted a tax regime "exempting state officials while leaving federal officials (or a subcategory of them) subject to the tax, that would indeed present a starkly different case." *Ibid.*

3. It may sometimes be difficult to determine whether there are "significant differences" between state employees (or retirees) who receive a state tax exemption and the federal employees (or retirees) who do not. But this Court's decisions have established several guiding principles. First, the conditional structure of Section 111—through which the federal government consents to state taxation of its own employees only if the State's taxes are nondiscriminatory—requires the State to "justify" any inconsistent treatment. *Davis*, 489 U.S. at 816 (considering only the "allegedly significant differences" proffered by the State); see *Barker*, 503 U.S. at 598 (same); see also *Phillips Chemical*, 361 U.S. at 383-384 (same applying the Constitution).

Second, while the most natural comparison for purposes of Section 111 is typically between state and federal employees who perform similar work, see *Jefferson County*, 527 U.S. at 443, job duties are not the only potentially relevant difference under Section 111. See *Barker*, 503 U.S. at 598-600. The determination for purposes of Section 111 of which federal workers or retirees are similarly situated to the state employees receiving more favorable tax treatment will depend on how the State has defined the favored class. If that class is defined by reference to employees who perform specified job duties, the similarly situated federal employee

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[4] Respondent is thus incorrect (Br. in Opp. 26) in describing *Jefferson County* as "uph[o]ld[ing] a tax exemption that the county made available to *some* state and local judges, but *no* federal judges."

will be one who performs (or formerly performed) comparable duties. By contrast, if a State exempts from tax all benefits paid to state retirees age 75 or older, the comparable federal retiree would be a person of that age.

Third, courts will not credit supposed differences that are not actually incorporated into the State's tax statute, or that the State does not consistently apply. In *Davis*, the Court held that Michigan's inconsistent tax treatment of federal and state retirees could not be justified on the ground that Michigan's "retirement benefits [were] significantly less munificent than those offered by the Federal Government." 489 U.S. at 816. The Court explained that "[a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees." *Id.* at 817. Similarly in *Barker*, the Court held that Kansas's disparate tax treatment could not be justified on the ground that state retirees had "contributed to their retirement benefits" while federal military retirees had not, because the State applied its income tax "to other federal retirees who contributed to their benefits." 503 U.S. at 605 n.5; see *id.* at 604-605 (stating that courts must ensure that a State's "articulated rationale" for inconsistent tax treatment is not "a cloak for discrimination").

Finally, the State must identify a *significant* difference between state and federal employees in order to justify inconsistent tax treatment. The Court in *Barker* concluded, for example, that the fact that military retirees, unlike state retirees, "remain in the service and are subject to restrictions and recall" did not constitute a

"significant difference[ ]" that could justify the State's inconsistent taxation. 503 U.S. at 599-600.[5]

B. Unless Respondent Can Identify Significant Differences Between Mr. Dawson And The State Law-Enforcement Officers Who Receive A Total State-Tax Exemption, The Inconsistent Treatment Between Them Violates Section 111

1. Under this Court's precedents interpreting and applying Section 111, and the constitutional principles on which that statute is based, this case is straightforward. West Virginia Section 12(c)(6) fully exempts from income taxation the retirement benefits of multiple classes of state law-enforcement officers, while providing a lesser exemption for the retirement benefits received by federal law-enforcement officers like Mr. Dawson. The state circuit court found it "undisputed * * * that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforce-

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[5] Some state tax exemptions will be unproblematic even though they result in particular federal retirees receiving less favorable tax treatment than particular state retirees who previously performed comparable duties. See *United States* v. *County of Fresno*, 429 U.S. 452, 464 (1977) (holding that a facially neutral state tax whose burden falls predominantly on federal employees is not discriminatory for that reason alone). West Virginia's more generous tax exemption for disabled persons (see p. 5, *supra*), for example, raises no meaningful concern under Section 111. Although a disabled state retiree would receive the exemption, and a non-disabled federal retiree who had performed the same duties would not, that disparity would not constitute discrimination "because of" the federal retiree's source of income. 4 U.S.C. 111(a). Rather, the disparity would be "because of" the employees' respective disabled and non-disabled status.

ment officers listed in [Section 12(c)(6)]" that would justify the discriminatory treatment. Pet. App. 22a. The West Virginia Supreme Court of Appeals did not dispute that view of the record, and the court did not identify any other significant differences that would justify higher state taxation of federal law-enforcement officers than of comparable West Virginia law-enforcement officers. See *id.* at 12a-16a.

Respondent contends (Br. in Opp. 28) that "*Davis*'s significant difference standard is a means by which a state tax law may withstand scrutiny *even if* it discriminates based on source of pay; it is not itself necessary in determining whether such discrimination has occurred." That is incorrect. The Court in *Davis* held that "discriminat[ion]" under 4 U.S.C. 111(a) refers simply to "inconsistent" tax treatment, and that, whenever a state tax statute subjects federal employees to heavier taxation than comparable state workers, the significant-differences test is "the relevant inquiry" to determine whether that discrimination is (impermissibly) "because of" the federal employee's source of pay or (permissibly) because of something else. 489 U.S. at 816; see *Barker*, 503 U.S. at 598.

If this Court vacates the judgment of the state supreme court, respondent will be entitled to assert on remand any preserved arguments that Mr. Dawson is sufficiently unlike those state law-enforcement officers who receive a total income-tax exemption to justify differential treatment. But in the absence of such a justification—*i.e.*, if the only salient difference between Mr. Dawson and the employees who pay lower taxes under Section 12(c)(6) is that Mr. Dawson worked for the federal government and the tax-exempt employees worked for the State—then West Virginia's denial of

Mr. Dawson's request for the same complete tax exemption constitutes prohibited "discriminat[ion] * * * because of" his federal source of pay. 4 U.S.C. 111(a).

2. In the West Virginia Supreme Court of Appeals, respondent argued that, even if Mr. Dawson's job responsibilities were substantially similar to those of former state law-enforcement officers who receive a total tax exemption, the difference in tax treatment is still "related to and justified by a significant difference between Dawson and the narrow class of state government retirees who qualify for the exemption." Resp.'s Br. to W. Va. S. Ct. of App. at 20. Respondent identified, as the asserted salient difference between Mr. Dawson and the tax-exempt state retirees, "the significantly more munificent retirement benefits Dawson receives than the state retirees who qualify for the exemption." *Ibid*; see *id.* at 20-23; Br. in Opp. 29-30. The state supreme court did not address that argument.

If this Court vacates the decision below and respondent raises this argument on remand, it will be necessary for respondent to demonstrate that the State applies "evenhanded[ly]" this asserted rationale for its differential tax treatment. *Davis*, 489 U.S. at 817. In defending the blanket tax exemption for state retirees that was at issue in *Davis*, and the failure to provide a comparable exemption for federal retirees, the State of Michigan "argue[d] that its retirement benefits [were] significantly less munificent than those offered by the Federal Government," and that "[t]he substantial differences in the value of the retirement benefits paid the two classes should * * * justify the inconsistent treatment." *Id.* at 816. The Court rejected that proffered justification, explaining that "[a] tax exemption truly

intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees." *Id.* at 817. Similarly, in *Phillips Chemical*, the Court explained that Texas's discriminatory treatment of leases of state-owned versus federally owned property could not be sustained on the ground that the State does not lease property that is "exactly comparable" in "size, value, or number of employees involved," because the statutory tax rate "was not based on such factors," but rather on "the identity of the * * * lessor." 361 U.S. at 384-385.

Thus, in order for respondent to invoke an asserted benefits differential as a ground for rejecting Mr. Dawson's Section 111 claim, respondent would be required to show that West Virginia law actually "discriminate[s] on the basis of the amount of benefits received by individual retirees," *Davis*, 489 U.S. at 817, rather than simply on the basis of the retirees' source of pay. To make that showing, respondent would need to demonstrate that West Virginia treats the amount of benefits received as a determinative factor in distinguishing the *state* retirees who receive a total tax exemption from the state retirees who do not. See pp. 14-15, *supra*.

C. The West Virginia Supreme Court Of Appeals Identified No Sound Reason For Finding Section 111 To Be Inapplicable Here

The state supreme court offered several rationales for rejecting Mr. Dawson's claim of unlawful tax discrimination. None is persuasive.

1. The court below stated that "tax exemptions are strictly construed against the taxpayer." Pet. App. 14a. That principle of West Virginia law has no application

to this case, because there is no dispute about the meaning of Section 12(c)(6) that would call for "constru[ction]." Rather, the statute to be construed is 4 U.S.C. 111, whose interpretation presents "a question of federal law." *Jefferson County*, 527 U.S. at 439. And there is no sound reason to resolve any ambiguities in that provision against the taxpayer, particularly given Section 111's purpose "to protect" the federal government's operations against "undue interference" by the States. *Davis*, 489 U.S. at 814.

2. The state supreme court also observed that this Court has found a violation of Section 111 only when a State's law provided a "blanket exemption to *all* state retirees." Pet. App. 10a. The state court found Section 12(c)(6) to be permissible because it "applies to a narrow but diverse class of state retirees" that as of 2010 was "less than two percent" of all state-government retirees. *Id.* at 13a. That focus on the "narrow[ness]" of the State's exemption is inconsistent with the text of Section 111, and with this Court's reasoning in *Davis* and in other intergovernmental-tax-immunity cases.

a. Section 111 provides that a State must "not discriminate against" a federal employee "because of" his federal source of pay. 4 U.S.C. 111(a). A State therefore may not impose any form of "inconsistent tax treatment" that is not "directly related to, and justified by, 'significant differences between the two classes'" of taxpayers. *Davis*, 489 U.S. at 816 (quoting *Phillips Chemical*, 361 U.S. at 383-385). The statute does not allow *some* discrimination based on source of pay, so long as the State confines the inconsistent treatment to a narrow class of taxpayers. Cf. *Ross* v. *Blake*, 136 S. Ct. 1850,

1857 (2016) ("Time and again, this Court has taken [mandatory] statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements.").

To be sure, the breadth or narrowness of a state tax exemption will affect the *scope* of the State's resulting obligations under Section 111. If a State exempts from taxation benefits paid to all state retirees, it must likewise exempt all federal retirees' benefits in order to comply with Section 111's nondiscrimination mandate. By contrast, if the state exemption is limited to a narrow subset of state retirees, the State can comply with Section 111 by exempting only the comparable class of federal retirees. See pp. 14-15, 16 n.5, *supra*. But the narrowness of the exemption conferred by Section 12(c)(6) provides no sound basis for concluding that Section 111 does not apply *at all*.

When Congress enacted the original version of Section 111, it drew on this Court's constitutional precedents in *Gerhardt* and *Graves*. See *Davis*, 489 U.S. at 812-813. The Court in those cases had not suggested that it would permit distinctions based on the source of the taxpayer's pay if the exempted classes were relatively small. On the contrary, in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall found it essential to draw clear lines constraining the States' authority to tax the federal government precisely in order to avoid "the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power." *Id.* at 430. See also *South Carolina* v. *Baker*, 485 U.S. 505, 526 n.15 (1988) ("[T]he best safeguard against excessive taxation (and the most judicially manageable) is the requirement that the government tax in a nondiscriminatory fashion.").

Analogous statutes, which would have been familiar to the 1939 Congress that enacted Section 111, likewise established categorical bans on particular types of "discrimination." Under the Interstate Commerce Act of 1887, ch. 104, Pt. I, § 2, 24 Stat. 379-380, for example, a common carrier would be "guilty of unjust discrimination" if it charged "a greater or lesser compensation * * * in the transportation of a like kind of traffic under substantially similar circumstances and conditions." See *Baldwin's Century Edition of Bouvier's Law Dictionary* 305 (1926) ("discrimination" is "generally applied in law to a breach of the statutory or common-law duty of a carrier to treat all customers alike"). This Court construed that statute as categorically barring any preferential treatment for particular shippers. See, *e.g.*, *Illinois Commerce Comm'n* v. *United States*, 292 U.S. 474, 485 (1934) ("maintaining a lower rate [for one shipper] * * * is necessarily discriminatory wherever the two classes of traffic * * * are carried on * * * under substantially the same conditions"); *The Tap Line Cases*, 234 U.S. 1, 28-29 (1914) (holding that the Act prohibits "practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear").

b. The West Virginia Supreme Court of Appeals' attempt to confine *Davis* to its facts ignores the reasoning of this Court's opinions. The Court in *Davis* did not strike down the Michigan statute because of the number of state employees who were exempt, but rather because the Court saw no "significant differences" between the exempt state and non-exempt federal employees that "justified" the differential treatment. 489 U.S. at 816. The Court took the same approach in *Barker*, finding "no significant differences between military retirees

and state and local government retirees that justify disparate tax treatment by the State." 503 U.S. at 600.

Jefferson County involved a tax exemption that benefitted a relatively small class of persons—those holding a state or county professional license—that was estimated to be eight percent of the county's workforce. 527 U.S. at 428-429, 442 n.12. But while the Court rejected the plaintiffs' Section 111 challenge to the exemption, it did not base that holding on the number of persons affected. Instead, the Court held that the county law was nondiscriminatory because it produced the same results "between similarly situated federal and state employees." *Id.* at 443. All judges who worked in the county paid the tax, whether they were employed by the State or by the federal government, *ibid.*; and federal employees in licensed professions (*e.g.*, attorneys) received the same exemption as their state-employed counterparts, *id.* at 442 n.12. In other intergovernmental-tax-immunity cases, the Court has concluded that the challenged state tax statutes were discriminatory because they treated taxpayers differently based on the sources of their income, not because of the breadth or narrowness of the state exemptions. See, *e.g.*, *Phillips Chemical*, 361 U.S. at 387 ("The differences between the two classes * * * seem too impalpable to warrant such a gross differentiation."); *Memphis Bank*, 459 U.S. at 398 n.8 (rejecting the State's defense that "the impact of" its discriminatory tax "[w]as *de minimis*," and noting the adverse consequences to the United States "if all 50 States enacted [similar] provisions").

3. The state supreme court also emphasized that the "'intent of the scheme'" for Section 12(c)(6) was not "to discriminate against employees or former employees of

the federal government," but instead "to give a benefit to" certain state retirees. Pet. App. 14a-15a (citation omitted). That reasoning closely tracks the analysis of the *dissent* in *Davis*. In the dissent's view, "[t]he fact that a State may elect to grant a preference, or an exemption, to a small percentage of its residents does not make the tax discriminatory in any sense that is relevant to the doctrine of intergovernmental tax immunity." *Davis*, 489 U.S. at 821 (Stevens, J., dissenting). The Court rejected that position as inconsistent with "the underlying rationale for the doctrine of intergovernmental tax immunity." *Id.* at 815 n.4 (majority op.).

The *Davis* Court found it "wholly beside the point" that Michigan wished to "hir[e] and retain[ ] qualified civil servants through the inducement of a tax exemption for retirement benefits," since that fact did nothing to negate the existence of discrimination, but "merely demonstrate[d] that the State ha[d] a rational reason for discriminating between two similar groups of retirees." 489 U.S. at 816. The Court explained that the "State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant" to the dispositive "inquiry into the nature of the two classes receiving inconsistent treatment." *Ibid.* Indeed, the *Davis* Court concluded that "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it." *Id.* at 815 n.4.

When Section 111 was enacted in 1939, dictionaries referred to "discrimination" as unequal treatment of persons similarly situated whether that treatment was motivated by favoritism or by malice. See *Webster's New Int'l Dictionary of the English Language* 745 (reprint

1942) (2d ed. 1934) (to "discriminate" is "[t]o make a difference in treatment or favor * * * ; as, to *discriminate* in favor of one's friends; to *discriminate* against a special class"); *Black's Law Dictionary* 588 (3d ed. 1933) ("discrimination" is a "failure to treat all alike under substantially similar conditions," such as by "confer[ring] particular privileges on a class arbitrarily selected from a large number of persons" when "no reasonable distinction can be found"). In the context of common carriers who were subject to an analogous nondiscrimination mandate, it was settled by 1939 that "preferences may inflict undue prejudice, though the carrier's motives in granting them are honest," and that "[s]elf-interest of the carrier may not override the requirement of equality in rates." *United States* v. *Illinois Cent. R.R.*, 263 U.S. 515, 524 (1924).

With respect to taxes imposed on other types of income as well, the Court has invalidated state laws that were intended to benefit narrow classes of persons dealing with the State, rather than to disadvantage the federal government or those with whom it interacted. See *Phillips Chemical*, 361 U.S. at 383-384 (holding that Texas's preferential tax treatment for leases of state-owned property could not be justified on the ground that the State sought to "foster its own interests by adopting measures which facilitate the leasing of its property"); see also *Memphis Bank*, 459 U.S. at 398 (holding that a Tennessee tax impermissibly favored "securities issued by Tennessee and its political subdivisions").

By the same token, when the Court upheld the statutes challenged in *Gerhardt*, *Graves*, and *Jefferson County*, it did not suggest that those laws were nondiscriminatory because they were based on a benevolent motive. Instead, in each case, the Court considered

whether the state law produced disparate tax treatment of "similarly situated federal and state employees." *Jefferson County*, 527 U.S. at 443; cf. *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958) (holding that a State's tax on leased property was nondiscriminatory because it applied equally to "persons who use property owned by the Federal Government, the State, its political subdivisions, * * * and a great host of other entities").

West Virginia's intent is not relevant to this case because Section 12(c)(6) discriminates on its face: it provides a complete tax exemption to certain state law-enforcement retirees, without providing a comparable exemption to any class of retired federal law-enforcement officers. A statute like this one violates Section 111 because, regardless of motive, a State must "treat those who deal with the [Federal] Government as well as it treats those with whom it deals itself." *Davis*, 489 U.S at 815 n.4 (quoting *Phillips Chemical*, 361 U.S. at 385).

4. The state supreme court also concluded that Section 12(c)(6) is not discriminatory because the statute affords Mr. Dawson "more favorable tax treatment than" certain state judges, and treats him the same "as the vast majority of all state retirees." Pet. App. 15a. But Section 111 prohibits any discrimination between federal and state employees "because of" their different source of income. If Mr. Dawson has received less favorable tax treatment than West Virginia accords to the most comparable state retirees, the fact that state law treats him better than some *other* state workers cannot defeat Mr. Dawson's claim of unlawful discrimination. See *Jefferson County*, 527 U.S. at 442-443 & n.12 (applying Section 111 by comparing the treatment of state and federal employees who perform similar job duties).

It is likewise irrelevant that West Virginia treats federal retirees like Mr. Dawson no worse than private retirees. Pet. App. 15a. That was true of the state laws that the Court struck down in both *Davis* and *Barker*. See *Davis*, 489 U.S. at 815 n.4 (rejecting the dissent's position that the tax was constitutional because it drew no distinction between the federal retirees and the vast majority of voters in the State). The state law declared invalid in *Memphis Bank* under the analogous nondiscrimination rule established by 31 U.S.C. 742 (1976) (currently 31 U.S.C. 3124) also treated persons dealing with the federal government the same as those dealing with private entities. See 459 U.S. at 394 (Tennessee tax exempted only "interest on obligations of Tennessee and its political subdivisions"). And while the Texas law at issue in *Phillips Chemical* likewise made "no discrimination between the [Federal] Government's lessees and lessees of private property," 361 U.S. at 381, the Court struck down the statute under the Constitution because it discriminated in favor of state property. *Id.* at 383.[6]

5. Finally, the state supreme court relied on the fact that "only some [West Virginia] law enforcement officers * * * are permitted to" claim the Section 12(c)(6) exemption. Pet. App. 15a-16a. Mr. Dawson's claim could

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[6] The West Virginia Supreme Court of Appeals' analysis is also inconsistent with the typical understanding of what it means to "discriminate * * * because of" a prohibited criterion. 4 U.S.C. 111(a). An employer that paid its female executives less than its male executives, for example, could not escape liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, simply by showing that executives formed a small percentage of the company's overall workforce, or that female executives were paid as well as or better than male rank-and-file employees.

properly be rejected on that ground if he were demonstrably more comparable to the West Virginia officers who do not receive the state tax exemption than to those who do. But the state supreme court identified only three classes of state law-enforcement officers who fall outside the exemption: deputy sheriffs who started working before 1998 and who chose not to convert their pension to DSRS, Department of Natural Resources officers, and Capitol Police officers. See *id.* at 13a-14a. The court did not suggest, or identify any reason to believe, that Mr. Dawson is more similarly situated to any of those officers than to the several other categories of West Virginia officers who receive more favorable tax treatment.

CONCLUSION

The judgment of the West Virginia Supreme Court of Appeals should be vacated, and the case should be remanded for further proceedings consistent with this Court's decision.

Respectfully submitted.

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SEPTEMBER 2018

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* The Solicitor General is recused in this case.

No. 17-419

IN THE

Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER,
State Tax Commissioner of West Virginia,

Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF *AMICUS CURIAE* NARFE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Active and Retired Federal Employees Association ("NARFE") is a 501(c)(5) nonprofit membership organization, founded in 1921, dedicated to protecting and enhancing the earned pay, retirement, and health care benefits of federal employees, retirees, and their survivors. There are presently 205,000 members of NARFE, and all will potentially be affected by this Court's decision in the pending case. Federal annuitants (former federal employees and their surviving spouses) rely on the protections against discriminatory tax treatment that Congress put in place in 4 U.S.C. § 111 and this Court confirmed in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), in which NARFE also submitted an amicus brief. Current federal employees must consider state tax treatment of federal retirement income in deciding where to live when they retire. Given the importance of this case to the interests of its members, NARFE submits this amicus curiae brief to call the Court's attention to the dangers posed by the West Virginia Supreme Court of Appeals' incorrect interpretation of § 111 and *Davis*, and the magnitude of the impact such an

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[1] Pursuant to Supreme Court Rule 37.6, the amicus curiae affirms that no counsel for a party authored this brief in whole or in part; that no party or counsel for a party made a monetary contribution toward the preparation or submission of this brief; and that no person other than the amicus curiae or its counsels made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, each party has consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

interpretation of *Davis* would have on NARFE's members.

SUMMARY OF ARGUMENT

4 U.S.C. § 111 protects federal annuitants from discriminatory tax treatment by state governments. Adopting West Virginia's incorrect interpretation of 4 U.S.C. § 111 and *Davis* will undermine that protection, jeopardizing the fair treatment of the retirement benefits of 2.6 million federal annuitants nationwide. Federal retirement benefits are modest, and in many cases less generous than state benefits for similarly situated retirees. Relaxing the protections of *Davis* would let state legislatures once again discriminate against federal retirees by extending tax exemptions for state retirees, who often wield significant political power, and denying those tax exemptions for similarly situated federal retirees.

This Court should reverse.

ARGUMENT

I. Adopting West Virginia's Incorrect Interpretation of 4 U.S.C. § 111 and *Davis* Would Risk Unfair Tax Treatment For 2.6 Million Federal Annuitants Nationwide, Not Just Retired Federal Marshals in West Virginia

In *Davis v. Michigan Department of Treasury*, this Court held that under 4 U.S.C. § 111 state tax schemes cannot impose a "heavier tax burden" on retired federal government employees than on retired state and local government employees unless there are "significant differences between the two classes." 489 U.S. at 815-816. *Davis* ensured that *all* federal

annuitants, numbering 2.6 million and growing, do not face discrimination from state governments in the taxation of their retirement benefits. That guarantee of fair treatment is now in jeopardy.

Four years after *Davis*, West Virginia amended its tax code to provide a complete tax exemption for income received from certain state retirement plans but only a partial tax exemption for federal retirement income. TAXATION—REVENUE ENHANCEMENT MEASURES, 1993 West Virginia Laws Ch. 156 (S.B. 463). Those exemptions are now codified at W.Va. Code § 11-21-12(c)(6) ("Section 12(c)(6)"). In 2013, Petitioner James Dawson, a retired U.S. Marshal, was denied a complete exemption under Section 12(c)(6). The West Virginia Supreme Court of Appeals upheld the denial on the ground that Section 12(c)(6) "was not intended to discriminate against former federal marshals," and therefore does not violate the doctrine of intergovernmental tax immunity as enunciated in *Davis*. *Steager v. Dawson*, No. 16-0441, slip op. at 9 (W. Va. May 17, 2017).

The opinion below dramatically weakens the protection afforded by § 111 and *Davis* to federal retirees. It misreads *Davis* to prohibit only those discriminatory tax schemes that provide "blanket" exemptions for *all* state retirees but deny those exemptions to all similarly situated federal retirees. *Id.* at 10. Under the lower court's reading, provisions like Section 12(c)(6) are permissible because they are intended to "give a benefit to a very narrow class of state retirees" rather than discriminate against federal retirees. *Id.* This reading of § 111 and *Davis* is completely inconsistent with *Davis* and its progeny. If

permitted to stand, it would undermine *Davis's* guarantee of equal tax treatment and expose 2.6 million federal annuitants to discriminatory treatment across the nation.

State tax treatment of federal retirees varies widely across the country. *See* NATIONAL ACTIVE AND RETIRED FEDERAL EMPLOYEES ASSOCIATION, STATE TAX TREATMENT OF FEDERAL ANNUITIES (Apr. 2017). Almost all of these laws, however, can be traced to *Davis*. Prior to 1989, many states exempted *all* state retirement benefits from personal income taxation, while taxing retirement benefits paid by all other employees, including federal government retirees. Jerome R. Hellerstein & Walter Hellerstein, State Taxation ¶ 22.04[3][a][i] (3d ed. 2017) (hereinafter "State Taxation"). In the wake of *Davis*, there was a surge of legislative activity as states strove to scrub these discriminatory provisions from their tax codes. *See* Dan T. Coenen & Walter Hellerstein, *Suspect Linkage: The Interplay of State Taxing and Spending Measures in the Application of Constitutional Antidiscrimination Rules*, 95 Mich. L. Rev. 2167, 2178-2179 (1997) ("State legislatures, duty-bound after *Davis* to remove provisions favoring state over federal employees from their taxing systems, went to work as well"); State Taxation ¶ 22.04[3][a][i].

The most straightforward way for states to comply with § 111 and *Davis* was to adjust their tax exemptions so that federal and state retirees received equal treatment. This could be done either by extending exemptions to federal retirees or by eliminating exemptions for state retirees. But neither option was politically attractive: extending exemptions to federal retirees would require raising

taxes on other constituents or reducing spending on state services to make up for the lost taxes, while eliminating exemptions for state retirees would alienate a powerful interest group. Coenen & Hellerstein, *supra* at 2178-2179; State Taxation ¶ 22.04[3][a][i].

As a result, some states (West Virginia included) tried to circumvent § 111 and *Davis* by providing tax exemptions only to certain sub-classes of state retirees rather than to state retirees as a whole, while largely retaining the tax burdens on federal employees. Under this strategy, as long as states steered clear of so-called "blanket" tax exemptions for *all* state retirees, they could cater to powerful interest groups by doling out favorable treatment to specific sub-classes of state retirees while denying the same treatment to similarly situated federal retirees, who typically lack the same political influence with state legislatures. Some states have held that such schemes are unlawful under *Davis*. *See, e.g.*, *Hackman v. Director of Revenue*, 771 S.W.2d 77, 80 (Mo. 1989) (holding that Missouri's taxation scheme was unlawful because "[t]he effect of Missouri's scattered retirement benefit exemption statutes is identical to that of Michigan's exemption statute for purposes of a *Davis* analysis"). If the lower court's decision is left standing, however, states would be given a green light to implement this strategy for favoring state retirees—precisely the sort of discriminatory treatment that this Court prohibited in *Davis*.

The potential impact of the decision below is far from narrow. The lower court's misinterpretation of § 111 and *Davis* would not merely deny the petitioners

in this case a tax exemption. Nor would it affect only retired U.S. Marshals living in West Virginia, or only retired federal law enforcement officers living in the Mountain State. Instead, if the lower court's construction of *Davis* bars were left standing, it would expose *all* federal retirees across the country to discriminatory treatment schemes such as the one exemplified by Section 12(c)(6).

II. Adopting West Virginia's Incorrect Interpretation of 4 U.S.C. § 111 and *Davis* Would Cause Serious Hardship For 2.6 Million Federal Annuitants

The approach adopted by the lower court would expose 2.6 million federal annuitants to discriminatory tax treatment by state governments. Such treatment would cause these annuitants serious hardship. Federal annuities are generally modest, and are subject to frequent attempts to cut them back. If the protections of § 111 and *Davis* are stripped away or greatly narrowed, federal annuitants in states across the nation will likely see their tax burdens rise.

In 2017, 2,637,152 federal annuitants received $6,812,369,000 in annuities, for an average monthly annuity of $ 2,583. U.S. OFFICE OF PERSONNEL MGMT., STATISTICAL ABSTRACTS FISCAL YEAR 2017: FEDERAL EMPLOYEE BENEFITS PROGRAMS 22 (Jan. 2018) (hereinafter "2017 ABSTRACTS"). As these figures demonstrate, many federal annuitants cannot rely on their pension benefits for financial security: 40.9% of federal employee annuitants receive under $2,000 per month in federal pension benefits, and 17.8% receive under $1,000 per month. *Id.*

These annuities are distributed by two different systems: FERS and CSRS. In general, federal employees hired after 1984 receive benefits through the Federal Employees Retirement System (FERS). 5 U.S.C. § 8401, *et seq.* In 2017, the mean monthly annuity for retired federal employees under FERS was $1,436 and the median monthly annuity was $1,121. 2017 ABSTRACTS at 8. Employees hired before 1984 receive benefits through the Civil Service Retirement System (CSRS). In 2017, their mean monthly annuity was $3,651 and their median monthly annuity was $3,171. 2017 ABSTRACTS at 8. However, retirees under CSRS neither paid into nor receive Social Security, and any Social Security benefits they may be eligible for from private sector work are diminished under the Windfall Elimination Provision (WEP). 42 U.S.C. § 410(a)(5), (7). As a result, "[f]or career employees under CSRS, the annuity is their sole source of retirement income." *Hearing on Federal Employees' Retirement Security Before the Subcommittee On The Federal Workforce, U.S. Postal Service and Labor Policy of the H. Comm. on Oversight and Government Reform*, 112th Cong. 3 (2012) (statement of David B. Snell, Director of Retirement Benefits Services, NARFE). Moreover, the maximum monthly benefit under CSRS is capped at 80% of the average of annuitant's "final average salary" (FAS), defined by CSRS as the average of the three years it was the highest. *Id.* at 3-4.

As demonstrated above, federal retirees enjoy only modest retirement benefits under both FERS and CSRS. Even so, there are frequent efforts to reduce or eliminate federal retirement benefits provided under both systems. *See, e.g., NARFE Reaction to President Trump's FY19 Budget: The Unprecedented Attacks*

on Federal Employees and Retirees Continue, NARFE (Feb. 12, 2018), https://www.narfe.org/index.cfm?fa=viewOldArticle&id=4340 (indicating nine 2019 budget proposals that would cut earned federal benefits).

State taxes already exact a significant portion of these modest retirement benefits in many states. If the non-discrimination requirements of *Davis* were narrowed, state legislators would have little reason not to implement tax schemes under which favored categories of state retirees enjoyed substantial exemptions but federal retirees paid taxes on essentially all of their income.

III. State Retirees Often Receive More Generous Retirement Benefits Than Federal Retirees

Under *Davis*, whether Petitioner Dawson was treated more favorably than "state civilian retirees . . . [and] retired state justices and circuit judges" and treated the same as "the vast majority of all state retirees," *Dawson*, slip op. at 8-9, is irrelevant to whether the state of West Virginia discriminated against him. *Davis*, 489 U.S. at 816. Because Section 12(c)(6) places a heavier tax burden on similarly situated federal and state law enforcement retirees, it is unlawful.

But putting this aside, focusing on Petitioner Dawson's individual retirement benefits obscures the fact that many state retirees receive greater benefits than federal retirees in both relative and absolute terms. For example, many state retirement systems calculate the benefits for retired state public safety

workers using more generous formulas than do the federal systems for retired federal public safety workers. *Compare* RONALD SNELL, *STATE GOVERNMENTS' PUBLIC SAFETY RETIREMENT PLANS - TABLES* (AUG. 2012), HTTP://WWW.NCSL.ORG/RESEARCH/FISCAL-POLICY/STATE-RETIREMENT-PLANS-PUBLIC-SAFETY-TABLES.ASPX (listing formulas determining benefits for retired public safety workers in each state), *with* 5 U.S.C. § 8339(d) (retired federal public safety workers receive 2.5% times their FAS for their first 20 years of service and 2% thereafter under CSRS), *and* 5 U.S.C. § 8415(e) (retired federal public safety workers receive 1.7% times their FAS their first 20 years of service and 1% thereafter under FERS). In particular:

- Retired Louisiana firefighters, police, and sheriffs receive 3.5%, 3.33%, and 3% times their FAS (as defined under Louisiana law) times their years of service.
- Retired West Virginia police officers receive 2.75% times their FAS (as defined under West Virginia law) times their years of service.
- Retired Wyoming firefighters receive 2.8% times their FAS (as defined under Wyoming law) times their years of service.

And in some instances, state retirees not only benefit from more generous calculations, but also receive significantly higher raw benefits than do federal similarly situated federal retirees. *Compare* Edward Ring, *What is the Average Pension for a Retired Government Worker in California?*, CALIFORNIA POLICY CENTER, (Mar. 10, 2017),

https://californiapolicycenter.org/what-is-the-average-pension-for-a-retired-government-worker-in-california/ (indicating that the average pension for retired law enforcement officers in several California cities exceeded $100,000), *with* 2017 ABSTRACTS at 15, 16 (indicating that, in 2017, the average CSRS pension for law enforcement officers was $68,304 and the average FERS pension for law enforcement officers was $45,948).

CONCLUSION

The judgment of the Supreme Court of Appeals of West Virginia should be reversed.

Respectfully submitted,

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